245 N.C. App.—No. 3 Pages 330-568

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

MAY 22, 2018

MAILING ADDRESS: The Judicial Department
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THE COURT OF APPEALS
OF
NORTH CAROLINA

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[1]Appointed 1 August 2016 [2]Sworn in 1 January 2017 [3]Sworn in 1 January 2016 [4]Appointed 24 April 2017
[5]Retired 31 December 2016 [6]Retired 24 April 2017

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COURT OF APPEALS

CASES REPORTED

FILED 16 FEBRUARY 2016

CASES REPORTED WITHOUT PUBLISHED OPINIONS

which he had waived. Nevertheless, trial court judges should be aware that shackling defendant during trial can, under the proper circumstances, result in a failure of due process. **State v. Sellers, 556.**

Appeal and Error—record—motion to supplement—standing—The trial court did not err by denying respondent's motion to supplement the record to include two affidavits addressing the issue of standing. The trial court's decision to deny the motion to supplement was entirely reasonable. Respondent's motion to supplement was not filed until about nine months after her initial Application for Review in which she had the burden of demonstrating why she would have standing to obtain review and only 18 days before the hearing before the Superior Court. She had multiple opportunities before the Board of Adjustment to present evidence of standing but failed to do so, and the affidavits added very little new substantive information to the already voluminous record and would not have provided a basis for standing. **Cherry v. Wiesner, 339.**

ATTORNEY FEES

Attorney Fees—child support—insufficient findings—The trial court abused its discretion in awarding plaintiff attorney's fees in a child support action where the trial court failed to make any findings regarding whether plaintiff acted in good faith, whether defendant refused to provide adequate support, and the record and transcript were devoid of evidence showing that plaintiff was unable to defray the costs of this action. Additionally, the trial court failed to make sufficient findings of fact upon which a determination of the requisite reasonableness could be based. **Davignon v. Davignon, 358.**

CONSTITUTIONAL LAW

Constitutional Law—cruel and unusual punishment—fifteen-year-old—tried as adult—Where defendant was tried as an adult on charges of first-degree sexual offense for events that occurred when he was fifteen years old, defendant did not show a violation of his constitutional rights where he did not establish that his sentence was so grossly disproportionate as to violate the Eighth Amendment to the United States Constitution. **State v. Bowlin, 469.**

Constitutional Law—double jeopardy—resisting arrest—disorderly conduct—In a case arising from an encounter between officers and a mother in the lobby of the jail after her son had been arrested and denied bail, there was no double jeopardy in defendant being acquitted of resisting, delaying, or obstructing an officer but convicted of disorderly conduct in a public facility. The two offenses had different elements, and the proof of the disorderly conduct charge did not require any proof that the prohibited conduct obstructed or resisted an officer. **State v. Dale, 497**.

Constitutional Law—free speech—disorderly conduct—Although a defendant arrested for disorderly conduct in public facility argued that she had a First Amendment right to curse and shout in a public facility at officers who were in the process of jailing her son despite being warned that she was in the lobby of the jail and had to calm down, the case was controlled by *In Re Burrus*, 275 N.C. 517. **State v. Dale, 497.**

Constitutional Law—representation by counsel—pro se—trial court's inquiry—Defendant's right to be represented by counsel under the Sixth Amendment

EVIDENCE

Evidence—authentication—screenshots of social media page—content distinctive and related to defendant—Where a man was killed by defendant's pit bull and defendant was charged with involuntary manslaughter, the trial court did not err by admitting two screenshots taken from myspace.com showing defendant and the pit bull. Strong circumstantial evidence existed that the webpage and its unique content belonged to defendant—the screenname matched defendant's nickname; there were pictures of defendant and his pit bull, DMX; and there were videos with captions such as "DMX tha Killer Pit." The content was distinctive and related to defendant and DMX, and it was directly related to the facts. **State v. Ford, 510.**

Evidence—delayed consultant's report—excluded—The trial court did not err by granting defendants' motion in limine to exclude evidence that submission of a consultant's report was delayed until defendants had paid their consultant where plaintiff contended that this evidence was part of plaintiff's proof. **Heron Bay Acquisition, LLC v. United Metal Finishing, Inc., 378.**

Evidence—expert testimony—opinion as to cause of death—dog bites—Where a man was killed by defendant's pit bull and defendant was charged with involuntary manslaughter, it was not plain error for the trial court to allow a pathologist to opine that the victim's death was caused by dog bites. The pathologist gave his expert opinion on the victim's cause of death based on his autopsy of the body, including his observation of the bite marks on the body, and on his study of these types of cases. **State v. Ford, 510.**

Evidence—song posted on social media—performed by defendant—relative and probative—Where a man was killed by defendant's pit bull and defendant was charged with involuntary manslaughter, the trial court did not err by admitting a rap song recording from myspace.com in which defendant claimed that the victim was not killed by defendant's dog. The song was relevant and probative, outweighing any prejudicial effect. Further, in light of the overwhelming evidence of defendant's guilt, there was no reasonable possibility that, had the song not been admitted, a different result would have been reached at trial. **State v. Ford, 510.**

Evidence—videotaped statement to police—failure to show defendant understood Miranda rights—In defendant's retrial for several offenses related to the rape of his neighbor, the trial court erred by denying defendant's motion to suppress a videotaped statement he made to police, but the error was not prejudicial. Although defendant answered the officer's questions after being *Mirandized*, the State failed to make the "additional showing" by the preponderance of the evidence that defendant understood his rights and the consequences of waiving them. The error was not prejudicial because in the video recording defendant did not confess to the crime—rather, he adamantly proclaimed his innocence. Further, there was overwhelming evidence of defendant's guilt. **State v. Knight, 532.**

FALSE ARREST

False Arrest—violation of noise ordinance—probable cause—Plaintiff's claims for false arrest and malicious prosecution arising from violation of an Amplified Entertainment Permit ordinance were defeated where the officer acted as a reasonable, prudent person and had probable cause. **Adams v. City of Raleigh, 330.**

process. The Department relied on a provision of the administrative code stating that an employee may be dismissed for a current incident of unacceptable personal conduct, but waited 19 months after discovering the filing errors and pursuing a disciplinary action. **Renfrow v. N.C. Dep't of Revenue, 443.**

SENTENCING

Sentencing—felony—discretion—within mandatory parameters—Although felony sentencing is subject to statutory minimum sentences for a given prior record level and class of offense, the trial court retains significant discretion to consider the factual circumstances of the case, including defendant's age, in fashioning an appropriate sentence within the mandatory parameters. **State v. Bowlin, 469.**

Sentencing—wrong offense—sexual offense against child rather than first-degree sexual offense—Defendant was erroneously sentenced for the wrong offense and the case was remanded for resentencing where defendant was convicted of three charges of first-degree sexual offense in violation of N.C.G.S. § 14-27.4(a)(1) but was sentenced for three counts of sexual offense against a child by an adult in violation of N.C.G.S. § 14-27.4A. **State v. Bowlin, 469.**

SEXUAL OFFENSES

Sexual Offenses—first-degree sexual offense—serious personal injury—evidence sufficient for instruction—The trial court did not err by instructing the jury on first-degree sexual offense where the State proceeded on the basis of serious personal injury and the evidence demonstrated that an officer saw blood on the victim's lip; that she went to the emergency room for four hours where her injuries were photographed; the photographs verified that she suffered bruises on her ribs, arms, and face; she testified that she was in pain for four or five days afterwards; she felt unsafe being alone, broke her lease and moved across the state to be with her family two months after the incident; and at the time of trial, roughly a year later, and she still felt unsafe. **State v. Gates, 525.**

UNFAIR TRADE PRACTICES

Unfair Trade Practices—no-shop clause—sale of polluted property—The trial court did not err by granting summary judgment for defendants on plaintiff's claim for unfair and deceptive trade practices based on defendants' breach of a no-shop clause in an asset purchase agreement (APA) or its failure to disclose its discussions with others. Plaintiff failed to produce evidence of anything more than a simple breach of contract and produced no evidence that defendants' breach of the APA's no-shop clause caused any harm to plaintiff. **Heron Bay Acquisition, LLC v. United Metal Finishing, Inc., 378.**

SCHEDULE FOR HEARING APPEALS DURING 2018

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks in 2018:

January 8 and 22

February 5 and 19

March 5 and 19

April 2, 16 and 30

May 14

June 4

July None

August 6 and 20

September 3 and 17

October 1, 15 and 29

November 12 and 26

December 10

Opinions will be filed on the first and third Tuesdays of each month.

ADAMS v. CITY OF RALEIGH

[245 N.C. App. 330 (2016)]

KENNETH C. ADAMS, PLAINTIFF,
v.
THE CITY OF RALEIGH, DEFENDANT.

No. COA15-782

Filed 16 February 2016

1. False Arrest—violation of noise ordinance—probable cause

Plaintiff's claims for false arrest and malicious prosecution arising from violation of an Amplified Entertainment Permit ordinance were defeated where the officer acted as a reasonable, prudent person and had probable cause.

2. Constitutional Law—state claims—remedy provided by state law

Plaintiff's state constitutional claims failed where state law gave him the opportunity to present his claims and provided the possibility of relief under the circumstances.

Appeal by plaintiff from Order entered 30 March 2015 by Judge James E. Hardin, Jr. in Wake County Superior Court. Heard in the Court of Appeals 2 December 2015.

MEYNARDIE & NANNEY, PLLC, by Joseph H. Nanney, for plaintiff-appellant.

City Attorney Thomas A. McCormick, by Deputy City Attorney Hunt K. Choi, for defendant-appellee.

ELMORE, Judge.

Kenneth Adams (plaintiff) was arrested for violating the City of Raleigh's Amplified Entertainment Permit (AEP) Ordinance. After the charge was dropped, plaintiff sued the City of Raleigh (defendant). Plaintiff appeals from the trial court's order granting defendant's motion for summary judgment. After careful consideration, we affirm.

I. Background

In August 2011, plaintiff and his fiancée, LaToya Turner, rented commercial space on Capital Boulevard in Raleigh "for the express purpose of opening a teen club to provide at-risk youth a non-violent and drug-free place to socialize." Plaintiff and Turner formed a limited liability

company named, "Juice Bar Teen-Lounge" (Juice Bar). On 15 August 2011, plaintiff obtained a City of Raleigh business license for Juice Bar. The following day, Turner submitted an application to defendant for an AEP. On the application, Turner listed herself as a partner, plaintiff as the owner, the type of business as "event center," and the business start date as 15 August 2011. The application instruction sheet lists telephone numbers for Building Inspections and Fire Prevention, and states, "The applicant for an Amplified Entertainment Permit is responsible for scheduling the required inspections." It further states, "Please allow at least 90 days from your application date until you plan to begin providing Amplified Entertainment." Turner paid the $250 non-refundable application fee but did not pay the additional $250 permit fee.

Also on 16 August 2011, Turner contacted David Hickman, who at that time was the Code Enforcement Specialist, to conduct a courtesy inspection of Juice Bar. In Hickman's affidavit, he stated that the City Inspections Department offered courtesy inspections "as a public service" that were "not intended to be comprehensive, but were intended to identify obvious and serious issues." Hickman stated that after the courtesy inspection, he discussed with Turner the limited occupant load and the required music shut-off switch, and he recommended that plaintiff and Turner proceed with applying for their AEP in order to initiate the formal inspection process. Hickman clarified that a business may open "upon purchase of a business license, and mere purchase of a business license does not in itself trigger any inspection requirements. However, if a business wishes to provide amplified entertainment, it must first obtain an AEP." Hickman stated that neither plaintiff nor Turner requested an AEP inspection. Plaintiff answered as follows in an interrogatory: "On or about August 15, 2011, J.W. Pinder, the deputy fire marshal, told me that fire extinguishers needed to be placed on the walls in a visible location, that the ceiling tiles needed to be replace[d], that he needed certain prior inspections, and that he would be happy to come back out for a reinspection."

Days later, on 19 August 2011, plaintiff and Turner held a grand opening for Juice Bar. City of Raleigh Police Sergeant Michael Peterson obtained a social media advertisement from the Raleigh Police Department Intelligence Center indicating that approximately 700 teenagers planned to attend.[1] In order to learn more about Juice Bar, Sergeant Peterson contacted Joette Holman, City of Raleigh License Review

1. The advertisement lists 748 people as "attending," 694 people as "maybe attending," 23,231 people as "awaiting reply," and 1,526 people as "not attending."

Technician, and David Hickman in the City's Inspections Department. Holman informed Sergeant Peterson that defendant did not issue Juice Bar an AEP but that an application had been submitted. Hickman told Sergeant Peterson that the requisite inspections for the AEP had not been conducted.

Holman informed her supervisor, Sergeant Austin, about her conversation with Sergeant Peterson. Sergeant Austin then added Juice Bar to Netforces' list of nightclubs to inspect on 19 August 2011. Netforces, a multi-agency task force, is comprised of members of the City of Raleigh's Inspections Department, Police Department, and Fire Department, as well as representatives of Wake County and the State of North Carolina. "Netforces conducts inspections of nightclubs in the City of Raleigh and attempts to identify structural deficiencies, fire code violations, license violations, and health code violations."

Sergeant Peterson and Officer M.T. McKee drove separately to Juice Bar to observe the grand opening. When Sergeant Peterson arrived, he saw Officer G.T. Porter enter Juice Bar. Officer Porter was off-duty and providing security services at an adjacent grocery store. When Sergeant Peterson saw Officer Porter leave Juice Bar, he called Officer Porter to ask the purpose of his visit. Officer Porter stated that he approached Juice Bar out of curiosity, that he met the owner and informed him about Netforces, and that he advised the owner to make sure he obtained all requisite permits to operate his business.

Shortly thereafter, the Netforces team arrived at Juice Bar and observed violations of the fire code and health code. Plaintiff was identified as the owner and was issued a citation for selling food in violation of N.C. Gen. Stat. § 130A-248(b). A member of the Netforces team asked plaintiff to provide a copy of his business licenses and permits, and when plaintiff could not produce an AEP, Sergeant Peterson directed Officer McKee to arrest him. In Sergeant Peterson's affidavit, he stated,

> 15. Based on my observations at the Juice Bar Teen Lounge on August 19, 2011, my earlier conversations with Ms. Holman and Mr. Hickman, and information I gathered during the Netforces inspection from members of the Netforces inspection team, I concluded that there was probable cause to believe that Plaintiff had violated the AEP Ordinance by providing amplified entertainment without first obtaining an AEP.
>
> 16. Because I knew that the Plaintiff had been provided information about the AEP ordinance and its requirements

> during the application process, and that Plaintiff had been specifically warned by Officer Porter to be certain that he had obtained all necessary permits, I determined that Plaintiff's blatant violation of the AEP Ordinance warranted his arrest.

Plaintiff was charged with operating a business without first obtaining licenses and permits required by the Raleigh City Code. The magistrate's order states, "Subject failed to have a priviledge [sic] business permit and an amplified entertainment permit." The parties concede that plaintiff did not possess an AEP on 19 August 2011. On 16 August 2012, plaintiff filed a complaint in federal court alleging claims against defendant and Officer McKee in his individual capacity. On 30 September 2013, the parties filed a stipulation that all claims against Officer McKee were dismissed without prejudice. On 20 May 2014, the federal court dismissed plaintiff's remaining claims without prejudice. Because the claim for which the court had original jurisdiction was dismissed by stipulation, the court declined to exercise supplemental jurisdiction over the remaining state-law claims.

On 19 June 2014, plaintiff filed a complaint in Wake County Superior Court alleging the following claims against defendant: false imprisonment/false arrest; malicious prosecution; and violations of Article I, Sections 1, 19–21, and 35–36 of the North Carolina Constitution. Plaintiff filed an amended complaint on 1 October 2014. On 17 November 2014, defendant filed an answer to plaintiff's complaint, and on 2 February 2015, defendant filed a motion for summary judgment. Defendant argued there was no genuine issue of material fact and it was entitled to judgment as a matter of law because (1) plaintiff's arrest was supported by probable cause; (2) immunity barred plaintiff's claims; (3) the existence of common law remedies barred plaintiff's North Carolina constitutional claims; and (4) no statutory basis supported plaintiff's claim for punitive damages.

On 30 March 2015, the superior court granted defendant's motion for summary judgment and dismissed with prejudice all of plaintiff's claims. The court did not specify in the order the basis for its ruling. Plaintiff appeals.

II. Analysis

"On appeal, this Court reviews an order granting summary judgment *de novo*." *Manecke v. Kurtz*, 222 N.C. App. 472, 475, 731 S.E.2d 217, 220 (2012) (citations omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the

lower tribunal." *Smith v. Cnty. of Durham*, 214 N.C. App. 423, 430, 714 S.E.2d 849, 854 (2011) (citation and quotations omitted).

A motion for summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2013). "In deciding a motion for summary judgment, a trial court must consider the evidence in the light most favorable to the non-moving party." *Azar v. Presbyterian Hosp.*, 191 N.C. App. 367, 370, 663 S.E.2d 450, 452 (2008) (citing *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003)). "The moving party bears the burden of showing that no triable issue of fact exists." *Id.* (citing *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985)). "Once the moving party has met its burden, the non-moving party must forecast evidence that demonstrates the existence of a *prima facie* case." *Id.* (citing *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)). "If the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal." *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989).

Plaintiff argues that because his business falls within an exemption provided in the AEP ordinance, defendant could not have had probable cause to arrest him for violating the ordinance. Plaintiff also argues that his constitutional claims are not barred because he does not have an adequate remedy under state law as defendant claims it is shielded by governmental immunity. Lastly, plaintiff states that governmental immunity does not apply because defendant purchased insurance that applies to plaintiff's claims.

Defendant contends that the trial court properly granted summary judgment in its favor based on two theories. First, defendant had probable cause to arrest plaintiff, which defeats plaintiff's claims for false arrest and malicious prosecution. Second, even if there were doubt regarding probable cause, defendant has governmental immunity. Defendant also argues that state law remedies bar plaintiff's direct claims under the North Carolina Constitution.

A. Probable Cause

[1] "[U]nder state law, a cause of action in tort will lie for false imprisonment, based upon the 'illegal restraint of one's person against his will.' A false arrest, *i.e.*, one without proper legal authority, is one means of

committing a false imprisonment." *Williams v. City of Jacksonville Police Dep't*, 165 N.C. App. 587, 596, 599 S.E.2d 422, 430 (2004) (quoting *Myrick v. Cooley*, 91 N.C. App. 209, 212, 371 S.E.2d 492, 494 (1988)). "Probable cause is an absolute bar to a claim for false arrest." *Id.* (citing *Burton v. City of Durham*, 118 N.C. App. 676, 682, 457 S.E.2d 329, 333 (1995)).

A plaintiff must establish four elements to prove a claim for malicious prosecution: "(1) the defendant initiated the earlier proceeding; (2) malice on the part of the defendant in doing so; (3) lack of probable cause for the initiation of the earlier proceeding; and (4) termination of the earlier proceeding in favor of the plaintiff." *Nguyen v. Burgerbusters, Inc.*, 182 N.C. App. 447, 450, 642 S.E.2d 502, 505 (2007) (citations and quotations omitted). "[T]he presence of probable cause necessarily defeats plaintiff's claim." *Martin v. Parker*, 150 N.C. App. 179, 182, 563 S.E.2d 216, 218 (2002). "Whether probable cause exists is a mixed question of law and fact, but where the facts are admitted or established, the existence of probable cause is a question of law for the court." *Best v. Duke Univ.*, 337 N.C. 742, 750, 448 S.E.2d 506, 510 (1994) (citing *Cook v. Lanier*, 267 N.C. 166, 171, 147 S.E.2d 910, 914 (1966)).

Plaintiff argues that he was not required to obtain an AEP, that he was exempt from the ordinance because he was not going to provide amplified entertainment on a regular basis, and that penal ordinances and their exemptions are strictly construed. He further contends, "[T]he Ordinance cannot apply to [him] because, as of his arrest on August 19, 2011, he had used amplified entertainment 'four of [sic] fewer times a year.' " "[B]ecause the Ordinance cannot apply to him, there could not be probable cause to arrest [him] as a matter of law."

Defendant argues, "Although Appellant couches his argument in terms of probable cause, he actually argues that he was not *guilty* of violating the AEP ordinance. However, *conviction* of an offense requires proof beyond a reasonable doubt while probable cause is a much lower standard." Defendant notes, "While the AEP ordinance provides an exemption for any establishment providing amplified entertainment four or fewer times a year, this exemption is intended to apply to establishments which do not provide amplified entertainment during the ordinary course of business." Further, defendant claims, a business that provides amplified entertainment in the ordinary course of business must obtain an AEP prior to providing *any* amplified entertainment and "may not wait until after the fourth time that amplified entertainment is provided." Holman stated in her affidavit that this interpretation of the AEP ordinance has been consistently applied by defendant.

The AEP Ordinance provides, in pertinent part, the following:

> Section 12-2118. Definition.
>
> All establishments located in Raleigh and providing amplified music or other amplified entertainment shall possess an *Amplified Entertainment Permit*. Amplified Entertainment *shall* mean any type of music or other entertainment delivered through and by an electronic system. Televisions operating with no amplification other than their internal speakers and background music systems operated at a low amplification and not intended for entertainment *shall* not be deemed Amplified Entertainment.
>
> Religious worship facilities, schools and any establishment providing amplified entertainment four or fewer times a year are exempt from the provisions of this Division.
>
> Section 12-2124, Penalties.
>
> . . . .
>
> (b) In addition to the above fines and suspension, a violation of this ordinance is also a misdemeanor and *may* also be enforced through injunctive or other equitable relief.

"It is a well-established principle that an officer may make a warrantless arrest for a misdemeanor committed in his or her presence." *State v. Brooks*, 337 N.C. 132, 145, 446 S.E.2d 579, 588 (1994) (citing N.C. Gen. Stat. § 15A-401(b)(1)) ("Arrest by Officer Without a Warrant.–(1) Offense in Presence of Officer.–An officer may arrest without a warrant any person who the officer has probable cause to believe has committed a criminal offense."). "Probable cause 'may be based upon information given to the officer by another, the source of such information being reasonably reliable.' " *In re Gardner*, 39 N.C. App. 567, 571, 251 S.E.2d 723, 725 (1979) (quoting *State v. Roberts*, 276 N.C. 98, 107, 171 S.E.2d 440, 445 (1970)).

"The existence of probable cause is a 'commonsense, practical question' that should be answered using a 'totality-of-the-circumstances approach.' " *State v. McKinney*, 361 N.C. 53, 62, 637 S.E.2d 868, 874 (2006) (quoting *Illinois v. Gates*, 462 U.S. 213, 230–31, 76 L. Ed. 2d 527, 543 (1983)). "Probable cause is defined as those facts and circumstances within an officer's knowledge and of which he had reasonably trustworthy information which are sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense."

State v. Biber, 365 N.C. 162, 168–69, 712 S.E.2d 874, 879 (2011) (quoting *State v. Williams*, 314 N.C. 337, 343, 333 S.E.2d 708, 713 (1985)) (quotations omitted). Probable cause " 'does not demand any showing that such a belief be correct or more likely true than false. A practical, nontechnical probability that incriminating evidence is involved is all that is required.' " *Id.* at 169, 712 S.E.2d at 879 (quoting *Texas v. Brown*, 460 U.S. 730, 742, 75 L. Ed. 2d 502, 514 (1983)). "A probability of illegal activity, rather than a prima facie showing of illegal activity or proof of guilt, is sufficient." *Id.* (citing *Gates*, 462 U.S. at 235, 76 L. Ed. 2d at 546). Probable cause encompasses " 'factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' " *Gates*, 462 U.S. at 231, 76 L. Ed. 2d at 544 (quoting *Brinegar v. United States*, 338 U.S. 160, 175, 93 L. Ed. 1879, 1890 (1949)).

Here, defendant had probable cause to believe that plaintiff was violating the AEP ordinance on 19 August 2011. The AEP application that plaintiff filled out includes a one-page instruction sheet that states in bold and underlined text, "A business may not provide Amplified Entertainment until it has received an Amplified Entertainment Permit." Moreover, defendant had knowledge that plaintiff applied for the AEP and that an AEP had not been issued to Juice Bar. When the Netforces team and Raleigh Police arrived at Juice Bar, they observed a cashbox being used to collect admission fees, televisions mounted to the walls playing music videos, and a DJ playing amplified music through a sound system.

Although the AEP ordinance does not specifically state how the exemption applies, Sergeant Peterson was reasonable in concluding there was a "practical, nontechnical probability that incriminating evidence" was involved. *See Biber*, 365 N.C. at 169, 712 S.E.2d at 879. Because an officer's probable cause determination is not one of a legal technician, *see Gates*, 462 U.S. at 231, 76 L. Ed. 2d at 544, Sergeant Peterson acted as a reasonable, prudent person in concluding that plaintiff was providing amplified entertainment, plaintiff was required to have an AEP, plaintiff could not present an AEP to Netforces, and, as a result, plaintiff was in violation of the AEP ordinance—a misdemeanor.

Probable cause is not eliminated based on an after-the-fact decision by the State not to prosecute a particular claim or a conclusion by a court that a defendant is not guilty. Law enforcement officers need not have *prima facie* proof of guilt of illegal activity, only a probability. *See Biber*, 365 N.C. at 169, 712 S.E.2d at 879. Although plaintiff emphasizes that Sergeant Peterson has arrested thousands of people in his career but he has never arrested someone for failing to have an AEP, this is not

relevant to the probable cause inquiry. *See State v. McClendon*, 350 N.C. 630, 636, 517 S.E.2d 128, 132 (1999) ("[A]n objective standard, rather than a subjective standard, must be applied to determine the reasonableness of police action related to probable cause."). Because a finding of probable cause necessarily defeats plaintiff's claims for false arrest and malicious prosecution, we need not address governmental immunity as there is no liability.

B. Constitutional Claims

[2] Plaintiff's sole argument regarding his constitutional claims is that he does not have an adequate remedy under state law due to defendant's assertion of governmental immunity, citing *Craig v. New Hanover County Board of Education*, 363 N.C. 334, 340, 678 S.E.2d 351, 355 (2009), for the proposition that "if 'governmental immunity stands as an absolute bar,' the state law claim 'does not provide an adequate remedy.' "

In *Corum v. University of North Carolina*, our Supreme Court stated, "[I]n the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution." 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992). Here, unlike *Craig*, governmental immunity does not stand as an absolute bar to plaintiff's state law claims. "Because state law gives plaintiff the opportunity to present his claims and provides 'the possibility of relief under the circumstances,' plaintiff's state constitutional claims must fail." *Wilkerson v. Duke Univ.*, 229 N.C. App. 670, 676, 748 S.E.2d 154, 159 (2013).

III. Conclusion

The trial court did not err in granting defendant's motion for summary judgment based on the presence of probable cause.

AFFIRMED.

Judges CALABRIA and ZACHARY concur.

CHERRY v. WIESNER

[245 N.C. App. 339 (2016)]

LOUIS CHERRY AND MARSHA GORDON, PETITIONERS
v.
GAIL WIESNER, CITY OF RALEIGH, AND RALEIGH BOARD OF ADJUSTMENT, RESPONDENTS

CITY OF RALEIGH, A MUNICIPAL CORPORATION, PETITIONER
v.
RALEIGH BOARD OF ADJUSTMENT, LOUIS W. CHERRY, III, MARSHA G. GORDON, AND GAIL P. WIESNER, RESPONDENTS

No. COA15-155

Filed 16 February 2016

1. Pleadings—standing—property use

A respondent who failed to allege special damages was not an aggrieved party and lacked standing to contest a Certificate of Appropriateness issued by the Certificate of Appropriateness Committee of the Raleigh Historic Development Commission. The party invoking jurisdiction has the burden of proving the elements of standing and vague, general allegations that a property use will impair property values in the general area will not confer standing. Moreover, status as an adjacent landowner alone is insufficient to confer standing.

2. Jurisdiction—standing—no allegations of special damages

A respondent's contention that she did not have an opportunity to allege standing before the Board of Adjustment (Board) was rejected where her argument was not so much that she did not have the opportunity but that she did not realize that she needed to make a showing of her special damages. Ignorance of the law is no excuse; a party does not need notice that she must allege standing because standing is a jurisdictional prerequisite and the complaining party bears the burden of alleging in its pleadings that it has standing. Moreover, she actually had multiple opportunities to allege standing before the Board.

3. Jurisdiction—standing—necessary allegation

The trial court did not err by concluding that respondent lacked standing despite the Board of Adjustment's (Board) failure to directly address the issue. While the Board should have explicitly ruled upon the Raleigh Historic Development Commission's motion to dismiss for lack of standing, this did not relieve respondent of her

burden to allege standing in her pleadings since standing is a jurisdictional prerequisite. Moreover, the Board found that respondent had standing since otherwise it would not have considered respondent's appeal and ruled in her favor.

4. Appeal and Error—record—motion to supplement—standing

The trial court did not err by denying respondent's motion to supplement the record to include two affidavits addressing the issue of standing. The trial court's decision to deny the motion to supplement was entirely reasonable. Respondent's motion to supplement was not filed until about nine months after her initial Application for Review in which she had the burden of demonstrating why she would have standing to obtain review and only 18 days before the hearing before the Superior Court. She had multiple opportunities before the Board of Adjustment to present evidence of standing but failed to do so, and the affidavits added very little new substantive information to the already voluminous record and would not have provided a basis for standing.

Appeal by respondent Gail Wiesner from order entered on 15 September 2014 by Judge Elaine M. O'Neal Bushfan in Superior Court, Wake County. Heard in the Court of Appeals on 26 August 2015.

Kilpatrick Townsend & Stockton LLP, by Joseph S. Dowdy and Phillip A. Harris, Jr., for petitioner-appellees Louis Cherry and Marsha Gordon.

City of Raleigh Attorney Thomas A. McCormick, by Deputy City Attorney Dorothy K. Leapley and Associate City Attorney Nicolette Fulton, for petitioner-appellee City of Raleigh.

Petesch Law, by Andrew J. Petesch, for respondent-appellant Gail Wiesner.

STROUD, Judge.

Synopsis of Opinion

Gail Wiesner ("respondent") lives across the street from the single-family "modernist" design home of Louis Cherry and Marsha Gordon ("petitioners") in Raleigh's Oakwood neighborhood. Oakwood is a designated historic district, where the design of new construction must be approved by the Raleigh Historic Development Commission ("the

Commission"). As required by the rules of the historic district, before building on their vacant lot, petitioners applied for a certificate of appropriateness to build their new home ("the Cherry-Gordon house"). When the Commission held hearings to consider the application, respondent and others objected to petitioners' proposed modernist design because they considered it incongruous with the other houses in the historic district. After a series of hearings, the Commission approved the design, but then the Raleigh Board of Adjustment ("the Board") rejected the design. Petitioners then appealed the Board's ruling to the Superior Court, which reviews decisions of the Board and the Commission to make sure that their rulings comply with the law. The Superior Court reversed the Board's decision, which meant that the Commission's decision to approve the design was affirmed.[1] This opinion addresses respondent's appeal from the Superior Court's ruling.

The Superior Court did not rule on the question of the Cherry-Gordon house's modernist design and the claim of "incongruity" with the historic district but decided that respondent did not have legal standing to challenge the approval of the design. A person who brings a legal action challenging a land use decision like this one must have "standing" to bring the action. The applicable statute gives "standing" only to an "aggrieved party," as the law defines that term. Although respondent lives across the street from the Cherry-Gordon house, the location of her home does not automatically give her standing to challenge the issuance of the certificate. A nearby landowner has standing to challenge a land use decision like this one only if the new construction will cause him to suffer some type of "special damages" distinct from other landowners in the area. Usually, special damages include economic damages such as a decrease in property value and other direct adverse effects on the property of the landowner challenging the proposed land use, such as smoke, light, noise, or vandalism created by the new property use, which are different from the effects on the rest of the neighborhood. Respondent's claims of damages from the Cherry-Gordon house are all essentially aesthetic, since she believes the house does not fit in with the historic neighborhood and is unpleasant for her to see from her home across the street. Even if she is correct in her assessment of the Cherry-Gordon house's design, respondent has failed to show that she is an "aggrieved party" as the law defines that term, so the Superior Court's order reversing the Board's decision was correct and we affirm it.

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1. We refer to the Cherry-Gordon house as an existing home instead of a proposed home, since petitioners elected to proceed with construction of the home despite the pendency of this appeal, understanding the risk that they could be required to demolish it.

I. Background

On or about 23 August 2013, petitioners filed an Application for Certificate of Appropriateness with the Commission seeking a determination that their plan for the construction of the Cherry-Gordon house on a vacant lot in the Oakwood Historic District of Raleigh was not incongruous with the guidelines of the City of Raleigh. On 9 September 2013, the Certificate of Appropriateness Committee of the Commission ("the Committee") held a hearing on petitioners' application and voted to approve in part their application ("design approval") subject to certain conditions and to defer consideration of the Cherry-Gordon house's windows until a subsequent hearing. On 7 October 2013, the Committee held a second hearing and voted to approve petitioners' application regarding the proposed windows ("window approval"). On 17 September 2013, respondent gave notice of an intention to appeal the Committee's design approval decision to the Board, and on 24 October 2013, respondent gave notice of an intention to appeal the Committee's window approval decision to the Board. On 24 October 2013, petitioners purchased a building permit from the City of Raleigh and began construction of the Cherry-Gordon house pursuant to the certificate of appropriateness.

On or about 7 November 2013, respondent, through counsel, submitted her Application for Review of the Committee's design approval decision with the Board. The Application for Review form includes the following question: "**EXPLAIN TO THE BOARD HOW YOU ARE AN AGGRIEVED PARTY[.]**" (Emphasis in original.) Respondent answered: "As a resident adjacent to the subject property and a property owner in the Oakwood Historic District, I opposed and sought the denial of the Application for Certificate of Appropriateness, No. 135-13-CA, for 516 Euclid Street." Respondent also stated:

> The structure as proposed is incongruous to the Oakwood Historic District. It will harm the character of the neighborhood and contribute to erosion of the neighborhood's value as an asset to its residents, to the surrounding communities, to the businesses it supports, to in-town and out-of-town visitors, and to the City as a whole.

Respondent also alleged that the Committee made various procedural errors.

On or about 6 December 2013, respondent, again through counsel, submitted a substantively identical Application for Review of the Committee's window approval decision to the Board. Under the

"**EXPLAIN TO THE BOARD HOW YOU ARE AN AGGRIEVED PARTY**" question, respondent answered:

> As a resident adjacent to the subject property and a property owner in the Oakwood Historic District, I opposed and sought the denial of the Application for Certificate of Appropriateness, No. 135-13-CA, for 516 Euclid Street at both the Sept. 9, 2013 and Oct. 7, 2013 public hearings before the Certificate of Appropriateness Committee.

Respondent also stated:

> The windows proposed for the dwelling structure are incongruous to the Oakwood Historic District. It will harm the character of the neighborhood and contribute to erosion of the neighborhood's value as an asset to its residents, to the surrounding communities, to the businesses it supports, to in-town and out-of-town visitors, and to the City as a whole.

Respondent again alleged that the Committee made various procedural errors.

The Commission answered respondent's pleadings and moved to dismiss her appeal to the Board for lack of standing.[2] On 13 January 2014, the Board held a hearing on respondent's appeal and the Commission's motion to dismiss for lack of standing but postponed rendering its decision until a 10 February 2014 hearing. The Board invited the parties to submit written responses by 31 January 2014. On or about 31 January 2014, respondent filed a brief in which she argued:

> [T]he Record is sufficient to demonstrate that she will suffer special damages distinct from the rest of the community if an incongruous structure is constructed directly across the street from her home. However, should the Board need additional evidence as to special damages, [respondent] requests that she be permitted to present such evidence to the Board.

At a 10 February 2014 hearing, the Board announced its ruling to reverse the Commission's decision but did not directly address the issue of standing.

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2. The record does not provide a date for the Commission's answer and motion to dismiss.

On or about 20 February 2014, petitioners moved to alter or amend the judgment. On or about 10 March 2014, the City of Raleigh filed procedural objections to the Board's proposed findings and conclusions, including an argument that the Board had not addressed the issue of standing. At a 10 March 2014 hearing, the Board announced its ruling denying petitioners' motion and voted to approve the minutes of the 10 February 2014 hearing. The Board's counsel noted:

> With regard to this standing issue, I don't know that the Board is equipped to determine whether or not [respondent] sustained special damages, but I do—do believe that, by continuing with the hearing, that that was tantamount to making a determination that standing did exist. And, certainly, that is something that's preserved on the record for the City [of Raleigh] to appeal.

On 28 March 2014, petitioners filed a petition for writ of certiorari and a motion to stay in the Superior Court in Wake County, arguing that respondent lacked standing, among other arguments. On 31 March 2014, the Clerk of Superior Court for Wake County granted petitioners' petition and issued a writ of certiorari. On 31 March 2014, petitioners moved for a temporary restraining order and a preliminary injunction. On 2 April 2014, the trial court granted petitioners' motion for a temporary restraining order. The trial court ordered that respondent "shall cease, desist and refrain from enforcing" the Board's decision and "any subsequent threat of a Stop Work Order" and that petitioners "shall cease work" on the Cherry-Gordon house, provided that they "are allowed to preserve the property from ruin by wind, water, mildew, vandalism, as well as potential harm to trespassers[.]" On 2 April 2014, the City of Raleigh also filed a petition for writ of certiorari also arguing that respondent lacked standing, among other arguments. On 2 April 2014, the Clerk of Superior Court for Wake County granted the City of Raleigh's petition and issued a writ of certiorari. On 11 April 2014, the trial court granted petitioners' motion for a preliminary injunction.

On 7 August 2014, in both certiorari proceedings, respondent moved to supplement the record to include two affidavits addressing the issue of standing. On 14 August 2014, respondent answered both petitioners' and the City of Raleigh's petitions and moved to strike certain allegations and exhibits included in petitioners' petition. On 15 August 2014, the City of Raleigh moved to supplement the record to include certain documents that were before the Committee but were missing from the Board's record. On 22 August 2014, petitioners responded to respondent's motion to strike and moved to supplement the record. On 22 August

2014, petitioners also responded to respondent's motion to supplement, noting that respondent could have introduced the two affidavits about nine months earlier when she first appealed to the Board. The trial court held a hearing on 25 and 26 August 2014. On 25 August 2014, the City of Raleigh orally moved to consolidate the two certiorari proceedings. On 8 September 2014, the trial court granted the City of Raleigh's motion to supplement the record and motion to consolidate.

On 15 September 2014, the trial court entered an order in which it (1) concluded that respondent lacked standing and thus reversed the Board's decision; (2) affirmed the Commission's decisions; (3) denied respondent's motion to supplement the record; and (4) denied respondent's motion to strike and petitioners' motion to supplement the record as moot. On 3 October 2014, respondent gave timely notice of appeal.

II. Discussion

Respondent argues that the trial court erred in (1) concluding that she lacked standing to appeal the Commission's decisions to the Board; (2) finding that respondent had the opportunity to allege standing before the Board; (3) denying respondent's motion to supplement the record; (4) failing to determine what competent, material, and substantial evidence was before the Committee; (5) concluding that competent, material, and substantial evidence in the whole record supported the Committee's findings of fact and that the Committee's decisions were not arbitrary; and (6) concluding that the Committee did not act outside the scope of its authority or apply improper standards or interpretations of standards. Because we hold that respondent lacked standing to appeal the Committee's decisions to the Board, we do not address issues (4), (5), and (6).

A. Standing

i. Standard of Review

[1] "Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction, and is a question of law which this Court reviews de novo." *Smith v. Forsyth Cty. Bd. of Adjust.*, 186 N.C. App. 651, 653, 652 S.E.2d 355, 357 (2007) (citations, quotation marks, and brackets omitted).

ii. Analysis

The party invoking jurisdiction has the burden of proving the elements of standing. *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 113, 574 S.E.2d 48, 51 (2002), *disc. review denied*, 356

N.C. 675, 577 S.E.2d 628 (2003). As a jurisdictional requirement, standing relates not to the power of the court but to the right of the party to have the court adjudicate a particular dispute. North Carolina courts began to use

> the term "standing" in the 1960s and 1970s to refer generally to a party's right to have a court decide the merits of a dispute. Standing most often turns on whether the party has alleged "injury in fact" in light of the applicable statutes or caselaw. Here, we must also examine the forms of relief sought. *See* [*Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*], 528 U.S. 167, 185, 145 L. Ed. 2d 610, 629 (2000) ("a plaintiff must demonstrate standing separately for each form of relief sought").

Id. at 114, 574 S.E.2d at 52 (citations omitted).

Since standing is a jurisdictional requirement, the party seeking to bring her claim before the court must include allegations which demonstrate why she has standing in the particular case:

> Since the elements of standing are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.

Id. at 113, 574 S.E.2d at 51 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 119 L. Ed. 2d 351, 364 (1992)) (brackets omitted). "It is not necessary that a party demonstrate that injury has already occurred, but a showing of immediate or threatened injury will suffice for purposes of standing." *Mangum v. Raleigh Bd. of Adjust.*, 362 N.C. 640, 642-43, 669 S.E.2d 279, 282 (2008) (quotation marks omitted).

In the context of an appeal regarding a land use decision such as this case, N.C. Gen. Stat. § 160A-400.9(e) sets forth both the proper court to consider the appeal and the requirements of standing for parties seeking review:

> An appeal may be taken to the Board of Adjustment from the commission's action in granting or denying any certificate, which appeals (i) may be taken by *any aggrieved party*, (ii) shall be taken within times prescribed by the preservation commission by general rule,

> and (iii) shall be in the nature of certiorari. Any appeal from the Board of Adjustment's decision in any such case shall be heard by the superior court of the county in which the municipality is located.

N.C. Gen. Stat. § 160A-400.9(e) (2013) (emphasis added).

Thus, "any aggrieved party" may appeal a decision of a board of adjustment[3] to the superior court in the county where the municipality is located. *See* N.C. Gen. Stat. § 160A-400.9(e). Our case law has further defined the term "aggrieved party," particularly in the context of land use disputes:

> Aggrieved parties include owners of property upon which restrictions are imposed and those who have sustained pecuniary damage to real property in which they have an interest. Not only is it the petitioner's burden to prove that he will sustain a pecuniary loss, but he must also allege the facts on which the claim of aggrievement is based. The petition must therefore allege the manner in which the value or enjoyment of petitioner's land has been or will be adversely affected. Examples of adequate pleadings include allegations that the rezoning would cut off the light and air to the petitioner's property, increase the danger of fire, increase the traffic congestion and increase the noise level. Once the petitioner's aggrieved status is properly put in issue, the trial court must, based on the evidence presented, determine whether an injury has resulted or will result from the zoning action.

Kentallen, Inc. v. Town of Hillsborough, 110 N.C. App. 767, 769-70, 431 S.E.2d 231, 232 (1993) (citations, quotation marks, and brackets omitted). "[T]o be considered an 'aggrieved person' and thus have standing to seek review, a party must claim special damages, distinct from the rest of the community." *Casper v. Chatham Cty.*, 186 N.C. App. 456, 458, 651 S.E.2d 299, 301 (2007).

A reduction in value of property may be part of the basis for standing, but diminution in value alone is not sufficient:

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3. "The board of adjustment shall hear and decide appeals from decisions of administrative officials charged with enforcement of the zoning or unified development ordinance and may hear appeals arising out of any other ordinance that regulates land use or development[.]" N.C. Gen. Stat. § 160A-388(b1) (2013).

> A property owner does not have standing to challenge another's *lawful* use of her land merely on the basis that such use will reduce the value of her property. However, where the challenged land use is prohibited by a valid zoning ordinance, the owner of adjoining or nearby lands, who will sustain special damage from the proposed use through a reduction in the value of his own property, does have a standing to maintain an action to prevent the use.
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> Additionally, in [*Mangum*], our Supreme Court held that the petitioners in that case had standing to maintain their suit where the petitioners: (1) challenged a land use that would be unlawful without a special use permit; (2) alleged they would suffer special damages if the use is permitted; and (3) provided evidence of increased traffic, increased water runoff, parking, and safety concerns, as well as the secondary adverse effects that would result from the challenged use. 362 N.C. at 643-44, 669 S.E.2d at 282-83. Recently, this Court applied the standard set forth in [*Mangum*] and concluded that a petitioner challenging her neighbor's application for a use permit on the basis that the proposed use would reduce the value of the petitioner's property was sufficient to establish the petitioner had standing. [*Sanchez v. Town of Beaufort*, 211 N.C. App. 574, 579, 710 S.E.2d 350, 353-54, *disc. review denied*, 365 N.C. 349, 717 S.E.2d 745 (2011).]
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> We discern no meaningful distinction between [*Mangum*], *Sanchez*, and the present case. Here, petitioners testified to their concerns that the alleged unlawful approval of the Training Facility would increase noise levels, had the potential to result in groundwater and soil contamination, and threatened the safety of anyone on their property due to stray bullets. These problems, petitioners contend, would result in a decrease in their property values. We conclude this evidence was sufficient to establish standing to challenge [the intervenor-respondent's] proposed land use.

Fort v. Cnty. of Cumberland, 218 N.C. App. 401, 404-05, 721 S.E.2d 350, 353-54 (citations and quotation marks omitted), *disc. review denied*, 366 N.C. 401, 735 S.E.2d 180 (2012).

The fact that respondent owns property "immediately adjacent to or in close proximity to the subject property" also bears some weight on the issue of whether the party will suffer special damages, but status as an adjacent landowner alone is insufficient to confer standing. *Mangum*, 362 N.C. at 644, 669 S.E.2d at 283.

In *Kentallen*, the petitioner was an adjoining landowner who challenged the issuance of a special exception permit to the respondents allowing construction of a "thirty-foot by thirty-five-foot addition to a metal storage building" which was "located less than the required twenty feet from the rear boundary" of the respondents' lot; the building was a nonconforming use under the applicable ordinance. *Kentallen*, 110 N.C. App. at 768, 431 S.E.2d at 231-32. The petitioner alleged that the view of the building "would not be visually attractive." *Id.*, 431 S.E.2d at 231-32. This Court held that the petitioner was not an aggrieved party:

> In this case, [the petitioner's] allegation that it is the "owner of adjoining property" does not satisfy the pleading requirement, in that there is no allegation relating to whether and in what respect [the petitioner's] land would be adversely affected by the [Board of Adjustment for the Town of Hillsborough's] issuance of the special exception permit. Furthermore, the evidence presented before the Board, that the requested construction would increase "the negative impact" on the petitioner's property and "would not be visually attractive," is much too general to support a finding that [the petitioner] will or has suffered any pecuniary loss to its property due to the issuance of the permit.

Id. at 770, 431 S.E.2d at 233 (brackets omitted).

Vague, general allegations that a property use will impair property values in the general area also will not confer standing. In *Lloyd v. Town of Chapel Hill*, this Court held that the parties' allegation that they "owned property in the immediate vicinity of that upon which variances [from a town ordinance] had been sought and that grant of the variances would materially adversely affect the value of [their] property" did not demonstrate "special damages distinct from the rest of the community." *Lloyd v. Town of Chapel Hill*, 127 N.C. App. 347, 351, 489 S.E.2d 898, 900 (1997) (citation, quotation marks, and brackets omitted). Similarly, in *Davis v. City of Archdale*, this Court held that the parties' allegation that

rezoning ordinances would diminish the value of their property because they would increase "traffic on roads which already carry traffic volumes in excess of capacity and [would] increase[] demands upon already overburdened public utilities" did not demonstrate "special damages distinct from those of the rest of the community." *Davis v. City of Archdale*, 81 N.C. App. 505, 508, 344 S.E.2d 369, 371 (1986). In these cases, although the challengers to the land use alleged impairment of property values, the allegation was general for the entire neighborhood or area and not specific to a certain parcel of property. *See id.*, 344 S.E.2d at 371; *Lloyd*, 127 N.C. App. at 351, 489 S.E.2d at 900. And we note that even assuming that respondent's allegations are true and the proposed use will actually adversely affect property values in the general vicinity, because this type of effect is not distinct to the particular landowner who is challenging a land use, this factor alone does not confer standing. *See Davis*, 81 N.C. App. at 508, 344 S.E.2d at 371; *Lloyd*, 127 N.C. App. at 351, 489 S.E.2d at 900.

Several cases have provided examples of the types of special damages which will give a landowner standing to challenge a land use decision. In *Mangum*, our Supreme Court held that several adjacent and nearby landowners' allegations that the issuance of a special use permit for the construction of an adult establishment would cause "vandalism, safety concerns, littering, trespass, and parking overflow from the proposed business to [the parties'] adjacent or nearby lots" demonstrated special damages. *Mangum*, 362 N.C. at 645-46, 669 S.E.2d at 283-84. Similarly, in *Sanchez*, the petitioner's home was in a waterfront historic district across the street from the "Carpenter Cottage"; the respondent purchased the Carpenter Cottage and applied for a permit to demolish the cottage and build a one-and-one-half story structure which would block the petitioner's view of the water. *Sanchez*, 211 N.C. App. at 575-76, 710 S.E.2d at 351-52. The petitioner objected to the height of the respondent's proposed structure. *Id.* at 576, 710 S.E.2d at 352. The historic commission denied the application due to the proposed structure's height; the respondent appealed to the board of adjustment, which found that the commission's height limitation was "arbitrary and capricious" and remanded to the commission for issuance of a permit. *Id.* at 577, 710 S.E.2d at 352. The superior court affirmed the decision of the board of adjustment, and this Court affirmed. *Id.* at 577, 583, 710 S.E.2d at 352, 356. On the issue of standing, this Court noted the petitioner's allegations that the proposed structure "would interfere with her use of her property by causing her to lose her private waterfront view" and that "the loss of this view would reduce the value of [her] property by at least

$100,000" as sufficient to show that she suffered special damages. *Id.* at 579, 710 S.E.2d at 353-54.[4]

In this case, respondent alleged that she would suffer special damages because the Cherry-Gordon house is "directly across the street from her home" and that its architectural incongruity would "harm the character of the neighborhood and contribute to erosion of the neighborhood's value[.]" On appeal, her arguments are purely aesthetic or are not distinct to her property. She notes that her

> home sits directly across from the Cherry-Gordon property on a narrow street with no sidewalks. The front setbacks are especially shallow, with the two-story Cherry-Gordon dwelling only less than fifteen feet from the curb. [Respondent's] home features a wide front porch and many front windows.
>
> At the September 2013 [Commission] meeting, [respondent] opposed the 516-COA application for including multiple incongruous elements. Taking that allegation of incongruity as true, the Cherry-Gordons' proposed design would have dominated the view and vista from [respondent's] front windows, porch and yard with an incongruous structure. [Respondent] also addressed several adverse effects that would result [from] such incongruity, including reduced property values and impaired enjoyment of the neighborhood.

(Citations omitted.)

But these allegations do not demonstrate special damages *distinct to respondent*, other than the view from her front porch; rather, respondent alleges a generalized damage to the overall neighborhood—"reduced property values and impaired enjoyment of the neighborhood." The mere fact that respondent's home is "directly across the street" from the Cherry-Gordon house does not constitute special damages. *See Mangum*, 362 N.C. at 644, 669 S.E.2d at 283; *Kentallen*, 110 N.C. App. at 770, 431 S.E.2d at 233. Respondent's allegation is akin to the allegations in *Kentallen*, *Lloyd*, and *Davis*, where this Court held that the party had

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4. But as to the substantive issue—the approval of the proposed structure—the petitioner lost, since this Court agreed with the board of adjustment that the commission's height limitation was arbitrary. *Id.* at 582-83, 710 S.E.2d at 356. In other words, the damage to the petitioner's property value and view gave her standing but did not determine her claim on the merits. *See id.*, 710 S.E.2d at 356.

failed to allege special damages. *See Kentallen*, 110 N.C. App. at 770, 431 S.E.2d at 233; *Lloyd*, 127 N.C. App. at 351, 489 S.E.2d at 900; *Davis*, 81 N.C. App. at 508, 344 S.E.2d at 371; *Sarda v. City/Cty. of Durham Bd. of Adjust.*, 156 N.C. App. 213, 215, 575 S.E.2d 829, 831 (2003) ("Petitioners' mere averment that they own land in the immediate vicinity of the property for which the special use permit is sought, absent any allegation of special damages distinct from the rest of the community in their Petition, is insufficient to confer standing upon them.") (citation and quotation marks omitted). Respondent makes no allegation of damages particular to her property like the allegation of potential "vandalism, safety concerns, littering, trespass, and parking overflow" in *Mangum* or the allegation of the loss of a waterfront view and the resulting reduction of market value of the property in *Sanchez*. *See Mangum*, 362 N.C. at 645-46, 669 S.E.2d at 283-84; *Sanchez*, 211 N.C. App. at 579, 710 S.E.2d at 353-54. Because respondent has failed to even *allege* special damages, she is not an aggrieved party and thus lacks standing to contest the Committee's decisions. *See Casper*, 186 N.C. App. at 458, 651 S.E.2d at 301; N.C. Gen. Stat. § 160A-400.9(e).

iii. Respondent's Opportunity to Allege Standing

[2] Respondent responds that she did not have an opportunity to allege standing before the Board. But respondent's argument is not so much that she did not have the opportunity but that she did not realize that she needed to make a showing of her special damages. She actually had multiple opportunities to allege standing before the Board. After retaining counsel, respondent submitted two separate Applications for Review of the Committee's decisions to the Board. The Applications for Review were on forms provided for this purpose. The form has some instructions and questions with blanks for answers. The second page of the form includes the following section of instructions:

> General Statute 160A-400.9(e) provides that "An appeal may be taken to the Board of Adjustment from the Commission's action in granting or denying any certificate, which appeals (i) may be taken by any aggrieved party, (ii) shall be taken within times prescribed by the preservation commission by general rule, and (iii) shall be in the nature of Certiorari. Any appeal from the Board of Adjustment's decision in any such case shall be heard by the Superior Court of the County in which the municipality is located."
>
> Appeals in the nature of Certiorari means that the Board of Adjustment may review your case, but any review must

> be on the record of the case presented to the Commission and no new evidence can be introduced at this hearing.
>
> To clearly present your case, attach to this application the adopted minutes of the Commission meeting(s) **(attached hereto as Exhibit A),**[5] **]** copies of your COA application, any exhibits presented to the Commission during the hearing(s), copies of pertinent excerpts from the rules of procedure of the Commission, and any other relevant documents that were presented at the hearing. These copies must be obtained from the Commission to ensure that they are from the official record of the case. The Commission will forward any physical evidence in the record (photos, material samples, audiotape, etc.) to the [Board] for review during the hearing on your appeal.
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> **EXPLAIN TO THE BOARD HOW YOU ARE AN AGGRIEVED PARTY:**

The Application for Review form quotes the applicable statute, N.C. Gen. Stat. § 160A-400.9(e), as we discussed above, and explains the appeal process. In boldface and capitalized letters, the Application for Review form then asks the applicant to explain why she has standing, since only an "aggrieved party" may have standing to challenge the Commission's decision. Respondent argues: "Allowing the City [of Raleigh] to successfully challenge standing on the basis of an application that uses the word 'aggrieved,' but without any language as to special damages, would be contrary to the concept and principles of notice pleading." Essentially, respondent argues that her application was sufficient to give "notice" of the basis for her claim, and that she should not be required to set forth specific allegations of her special damages, particularly since the Application for Review form did not set forth a definition of the term "aggrieved party." But the Application for Review form goes above and beyond the call of duty in setting forth the applicable statute and general appeal procedure. Ignorance of the law is no excuse; a party does not need notice that she must allege standing because standing is a jurisdictional prerequisite and the complaining party bears the burden of alleging in its pleadings that it has standing. *See Smith*, 186 N.C. App. at 653, 652 S.E.2d at 357; *Kentallen*, 110 N.C. App. at 769, 431 S.E.2d at 232; *Neuse River Found.*, 155 N.C. App. at 113, 574 S.E.2d at 51; N.C. Gen.

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5. Respondent inserted this portion in bold in her first Application for Review and attached the minutes of the Committee's 9 September 2013 hearing as Exhibit A. The remainder of the text quoted is from the form itself.

Stat. § 160A-400.9(e). In addition, even after the Commission moved to dismiss her appeal for lack of standing and the Board invited the parties to submit written responses, respondent failed to allege special damages.

[3] Respondent also notes that the Board did not properly consider the issue of standing and if it had, she would have sought to supplement her evidence earlier in the process. Essentially, this argument is that the Board failed to directly address her standing and if it had, she would have submitted additional evidence. We agree that the Board should have explicitly ruled upon the Commission's motion to dismiss for lack of standing, but as the Board's counsel noted at the 10 March 2014 hearing, the Board obviously found that respondent had standing since otherwise it would not have considered respondent's appeal and ruled in her favor. But standing is a jurisdictional issue, which this Court would have to consider on appeal *de novo*, even if the Commission had not filed a motion to dismiss raising this defense, and even if the Commission, Board, and Superior Court had all failed to address it. *See Fort*, 218 N.C. App. at 404, 721 S.E.2d at 353 ("Whether a party has standing to maintain an action implicates a court's subject matter jurisdiction and may be raised at any time, even on appeal.") (citation and quotation marks omitted).

Even though the Board failed to directly rule upon the motion to dismiss, this does not relieve respondent of her burden to allege standing in her pleadings since standing is a jurisdictional prerequisite. *See Smith*, 186 N.C. App. at 653, 652 S.E.2d at 357; *Kentallen*, 110 N.C. App. at 769, 431 S.E.2d at 232; *Neuse River Found.*, 155 N.C. App. at 113, 574 S.E.2d at 51; N.C. Gen. Stat. § 160A-400.9(e). In any event, the Commission raised the issue of respondent's standing in its first responsive pleading, thus highlighting the need for support for her status as an aggrieved party. In sum, we hold that respondent had multiple opportunities to allege standing before the Board. We therefore hold that the trial court did not err in concluding that respondent lacked standing despite the Board's failure to directly address the issue.

B. Respondent's Motion to Supplement the Record

[4] Respondent next contends that the trial court erred in denying her motion to supplement the record to include two affidavits addressing the issue of standing. One was her own affidavit and the other an affidavit from Michael R. Ogburn, a real estate appraiser.

i. Standard of Review

N.C. Gen. Stat. § 160A-393(j) provides that the trial court "may, *in its discretion*, allow the record to be supplemented with affidavits, testimony of witnesses, or documentary or other evidence if, and to the extent that, the record is not adequate to allow an appropriate determination of the following issues: (1) Whether a petitioner or intervenor has standing." N.C. Gen. Stat. § 160A-393(j) (2013) (emphasis added). "To demonstrate an abuse of discretion, the appellant must show that the trial court's ruling was manifestly unsupported by reason, or could not be the product of a reasoned decision." *Terry's Floor Fashions, Inc. v. Crown Gen. Contr'rs, Inc.*, 184 N.C. App. 1, 17, 645 S.E.2d 810, 820 (2007) (citation omitted), *aff'd per curiam*, 362 N.C. 669, 669 S.E.2d 321 (2008).

ii. Analysis

Respondent moved to supplement the record to include two affidavits addressing the issue of standing. Respondent's brief fails to state any reason why the trial court's decision not to allow supplementation of the record was "manifestly unsupported by reason[.]" *See id.*, 645 S.E.2d at 820 (citation omitted). The legal authority cited for her claim of abuse of discretion is a general reference to our Supreme Court's statement in *Mangum* that

> the North Carolina Constitution confers standing on those who suffer harm: "All courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law." N.C. Const. art. I, § 18.

See Mangum, 362 N.C. 642, 669 S.E.2d at 281-82 (brackets and ellipsis omitted). This statement is true, but it does not explain how the trial court may have abused its discretion in denying respondent's request to supplement the record. As discussed above, the initial appeal form directed respondent to state why she was an "aggrieved party," but she failed to allege any special damages. The Commission raised the issue of respondent's standing before the Board, and respondent again had multiple opportunities before the Board to present evidence to support her standing but failed to do so. In fact, respondent's motion to supplement was not filed until 7 August 2014, about nine months after her initial Application for Review in which she had the burden of demonstrating why she would have standing to obtain review and only 18 days before the 25 August 2014 hearing before the Superior Court. This delay

alone could justify the trial court's discretionary denial of her motion. In addition, respondent had already submitted a tremendous amount of information as part of her opposition to the Commission's approval; the record in this case is over 1,200 pages.

We also note that the affidavits which she proffered as supplements add very little new substantive information to the already voluminous record and would not have provided a basis for standing. Respondent's own affidavit details the location of her home, her education and experience as a real estate broker, her opinion that the Cherry-Gordon house is "significantly incongruous" with the Oakwood Historic District, and details regarding the neighborhood. The only item of alleged impact upon respondent's property which could arguably be considered as distinct from the entire neighborhood noted in the affidavit is her complaint of increased traffic from people "gawk[ing]" at the "modernist house[.]" As "an example" of the Cherry-Gordon house's impact on her property, she avers:

> [N]ews reporters and other media agents staked out in front of and around my property waiting to ambush me with the intention of obtaining unscheduled interviews. Upon information and belief, it is [petitioners] and their agents who have fomented a significant amount of media coverage in this matter. This unwanted attention creates ingress and egress problems as well as a significant amount of anxiety for my husband and [me]. As a result of stories published in, among others, the News & Observer, Vanity Fair, Boston Globe, Seattle Times, and New York Times as well as a feature on the Today Show, I have received dozens of unsolicited emails and phone calls expressing rude, harassing, and graphic commentary on my involvement in this matter, even though I am only exercising my statutory right to seek review of a COA approval.

Even if the Cherry-Gordon house has generated increased "gawk[er]" traffic and unwanted media attention, respondent's affidavit indicates that the traffic increased due to the publicity surrounding the challenge to the construction of the Cherry-Gordon house. This is simply not the sort of increased traffic our prior cases have addressed as part of the basis for standing of an adjacent property owner to challenge a permit, since traffic is not generated by the usual or intended use of the Cherry-Gordon house or property itself but is generated only by the media coverage of the controversy surrounding its construction. The

Cherry-Gordon house is a 2,580-square-foot single-family residence, and the record shows that it would generate exactly the same type of "traffic" in its normal use as respondent's home or any other single-family residence of similar size.

The second affidavit provides some additional information regarding respondent's allegations regarding impairment of property values. The affidavit of Michael R. Ogburn details Mr. Ogburn's qualifications as a real estate appraiser and his opinion that respondent's property "will be adversely affected in terms of property value and marketability by the existence of the [Cherry-Gordon house] and that those effects, from a residential housing market standpoint, would be significant." This affidavit could arguably demonstrate a claim of special damages due to a decrease in respondent's property value (and not to the property values in the neighborhood generally), but as noted above, allegations of a decrease in value alone are not sufficient. *See Fort*, 218 N.C. App. at 404, 721 S.E.2d at 353 ("A property owner does not have standing to challenge another's *lawful* use of her land merely on the basis that such use will reduce the value of her property."). Although the parties dispute whether the Cherry-Gordon house is architecturally congruous with the Oakwood Historic District, petitioners' use of the property for a single-family residence is clearly lawful, and Mr. Ogburn's affidavit does not address any sort of secondary impacts upon respondent's property, such as traffic, noise, light, odors, runoff, or any other sort of potential damage generated by the use of petitioners' property. Overall, the trial court's decision to deny the motion to supplement was entirely reasonable, and we hold that the trial court did not abuse its discretion in denying respondent's motion to supplement the record.

III. Conclusion

For the foregoing reasons, we affirm the trial court's order.

AFFIRMED.

Judges CALABRIA and McCULLOUGH concur.

DAVIGNON v. DAVIGNON

[245 N.C. App. 358 (2016)]

CARLEY DAVIGNON, PLAINTIFF
v.
MICHAEL A. DAVIGNON, DEFENDANT

No. COA15-743

Filed 16 February 2016

1. Costs—travel expenses—outside statutory authority

The trial court erred in awarding travel expenses to plaintiff as allowable costs in a child support action where plaintiff had moved to another state. The trial court did not cite any authority upon which it based its order nor are the travel expenses of a party and her non-subpoenaed witnesses assessable costs as set forth in N.C.G.S. § 7A-305(d).

2. Attorney Fees—child support—insufficient findings

The trial court abused its discretion in awarding plaintiff attorney fees in a child support action where the trial court failed to make any findings regarding whether plaintiff acted in good faith, whether defendant refused to provide adequate support, and the record and transcript were devoid of evidence showing that plaintiff was unable to defray the costs of this action. Additionally, the trial court failed to make sufficient findings of fact upon which a determination of the requisite reasonableness could be based.

Appeal by defendant from orders entered 17 April 2013 and 31 March 2014 by Judge Ronald L. Chapman, and order entered 18 December 2014 by Judge David H. Strickland in Mecklenburg County District Court. Heard in the Court of Appeals 27 January 2016.

No brief for plaintiff-appellee.

Plumides, Romano, Johnson & Cacheris, by Richard B. Johnson, for defendant-appellant.

TYSON, Judge.

Michael A. Davignon ("Defendant") appeals from orders awarding court expenses and attorney's fees to Plaintiff, and an order relinquishing child support jurisdiction. We reverse and remand.

I. Factual Background

Defendant and Carley Davignon ("Plaintiff") were married on 22 May 1999, and separated on 16 November 2008. Two children were born of the marriage.

Both parties continued to live in Mecklenburg County, North Carolina after they initially separated. Plaintiff commenced this action on 19 February 2009, in which she sought: (1) child custody; (2) an order immediately sequestering the former marital residence to her; (3) child support; (4) postseparation support; (5) alimony; (6) equitable distribution; (7) interim distribution of marital and divisible property; and, (8) attorney's fees.

In August 2009, Plaintiff and the children moved to Pennsylvania. The trial court entered an order awarding temporary primary physical custody of the children to Plaintiff, with limited telephone visitation to Defendant, on 20 November 2009. Defendant also moved to Pennsylvania in 2011. The matter was set for trial in Mecklenburg County on 8 June 2011.

On 6 June 2011, counsel for Defendant was notified that Defendant had been incarcerated in Pennsylvania and could not attend the 8 June 2011 trial. On 7 June 2011, counsel for Defendant filed a motion to continue, which the trial court granted the following day.

Plaintiff filed a motion for court expenses, which she allegedly incurred in anticipation of the trial set to begin on 8 June 2011. The trial court entered a written order on 17 April 2013, which granted Plaintiff's motion and ordered Defendant to pay to Plaintiff costs in the amount of $4,640.57. The trial court made the following findings of fact to support its order granting Plaintiff's motion for court expenses:

> 5. Plaintiff had to fly from her home in Camp Hill, Pennsylvania to Charlotte. This cost a total of $817.90. . . . Plaintiff also incurred various expenses for eating while she was in Charlotte. These food expenses, which also include some meals shared by her and her father, William McClure, Jr., total $408.40. These expenses also include gas for the car jointly rented by Plaintiff and William McClure. . . .
>
> 6. Plaintiff and her father, William McClure, Jr., obtained a hotel room at Courtyard by Marriott. The costs [sic] for this room from June 6 – 8, 2011 was $511.35. . . .

> 7. Plaintiff's father . . . flew from Jackson, Wyoming to Charlotte in order to testify on behalf of his daughter. . . . William McClure, Jr. and Plaintiff split a rental car [from] Hertz. This cost a total of $229.67. . . . Mr. McClure had to purchase an airline ticket to fly in from Jackson, Wyoming. This cost a total of $1,640.30. . . .
>
> 8. Plaintiff also had the childrens' [sic] visitation supervisor, Tom Bowman, fly in from Pennsylvania in order to testify at trial. The invoice for Mr. Bowman was for $1,337.50. . . . Because the Motion to Continue was granted, Mr. Bowman did not have to stay the two days that he was planning on for the trial. This decreased the bill by approximately $104.00 to an amount of $1,233.00. Plaintiff paid this bill in the amount of $1,233.00. . . .
>
> 9. Plaintiff incurred costs that totaled $4,640.62. These costs were incurred by Plaintiff even though Defendant filed a Motion to Continue and did not appear.

Based on the foregoing findings of fact, the trial court concluded as a matter of law:

> 4. Defendant purposefully and intentionally committed actions, which caused him to get arrested on or around June 7, 2011. These criminal actions had nothing to do with Plaintiff and none of them were for anything related to Plaintiff whatsoever.
>
> 5. Plaintiff had to incur the court costs stated above in order to be present for trial on June 8, 2011 and in order to have her witnesses present at trial.
>
> 6. Through the trial of this matter, Plaintiff has shown good cause as to why her Motion for Court Expenses should be granted.

A hearing for Plaintiff's request for attorney's fees related to her child custody and child support claims was held on 15 January 2014. Neither party attended the hearing, and only counsel for Plaintiff and Defendant were present. Plaintiff did not offer any testimony or exhibits, other than an attorney's fees affidavit. On 31 March 2014, the trial court entered a written order awarding attorney's fees to Plaintiff in the amount of $30,000.00. The trial court made the following findings of fact in its order:

> 1. Plaintiff's attorney, Eric D. Levine, filed an Affidavit of Attorneys' [sic] Fees on January 15, 2014, which set out his total attorneys' [sic] fees during the entire case. The Affidavit of Attorneys' [sic] Fees of Eric D. Levine states that he had worked 269 hours. Mr. Levine bills his clients at the normal hourly rate of $200.00 per hour, which is fair and equitable considering his experience. The bills of Mr. Levine totaled $53,800.00.
>
> 2. Plaintiff did not have sufficient funds to defray the costs and expenses of this lawsuit, including attorneys' [sic] fees.

On 18 December 2014, the trial court entered an order relinquishing child support jurisdiction. The trial court noted Plaintiff and the children had "relocated to Colorado approximately over one and a half years ago. Defendant moved from North Carolina to Pennsylvania over three years ago in 2011 and still resides there now." The trial court divested itself of jurisdiction in this matter, and ordered any and all "further proceedings regarding child support shall be in one of the parties' states of residence." Defendant gave timely notice of appeal to this Court.

II. Issues

Defendant argues the trial court erred by: (1) ordering Defendant to pay $4,640.57 to Plaintiff as court costs; and (2) ordering Defendant to pay $30,000.00 in attorney's fees.

Defendant also purports to appeal from the trial court's order relinquishing child support jurisdiction. Defendant has failed to set out any arguments in his brief with regard to this order. It is well-settled that arguments not presented in an appellant's brief are deemed abandoned on appeal. N.C.R. App. P. Rule 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.") *See Guilford Cnty. Bd. of Educ. v. Guilford Cnty. Bd. of Elections*, 110 N.C. App. 506, 510, 430 S.E.2d 681, 685 (1993) (citations omitted).

III. Standard of Review

"Whether a trial court has properly interpreted the statutory framework applicable to costs is a question of law reviewed *de novo* on appeal. The reasonableness and necessity of costs is reviewed for abuse of discretion." *Peters v. Pennington*, 210 N.C. App. 1, 25, 707 S.E.2d 724, 741 (2011) (citations omitted). "Where the applicable statutes afford the trial

court discretion in awarding costs, we review the trial court's determinations for an abuse of discretion." *Khomyak ex rel. Khomyak v. Meek*, 214 N.C. App. 54, 57, 715 S.E.2d 218, 220 (2011), *disc. review denied*, __ N.C. __, 720 S.E.2d 392 (2012).

Whether the statutory requirements of N.C. Gen. Stat. § 50-13.6 have been met to support an award of attorney's fees is a question of law. We review the trial court's determination *de novo*. "[T]he amount of attorney's fees is within the sound discretion of the trial judge and is only reviewable for an abuse of discretion." *Atwell v. Atwell*, 74 N.C. App. 231, 237-38, 328 S.E.2d 47, 51 (1985) (citation omitted).

IV. Analysis

A. Court Expenses

[1] Defendant argues the trial court erred by ordering him to pay court costs to Plaintiff for travel expenses in the amount of $4,640.57. Defendant contends the trial court awarded court expenses to Plaintiff, which were not permitted by statute. We agree.

N.C. Gen. Stat. § 6-20 allows costs in a civil action "in the discretion of the court." N.C. Gen. Stat. § 6-20 (2013). Any costs awarded "are subject to the limitations on assessable or recoverable costs set forth in [N.C. Gen. Stat. §] 7A-305(d), unless specifically provided for otherwise in the General Statues. *Id.*

Prior to 2007, N.C. Gen. Stat. § 7A-305(d) set forth a list of expenses, which "when incurred, are assessable or recoverable, as the case may be. N.C. Gen. Stat. § 7A-305(d) (2006). In 2007, the General Assembly amended the statute to remedy a conflict between N.C. Gen. Stat. §§ 6-20 and 7A-305(d) and the appellate cases interpreting these statutes. 2006 N.C. Sess. Laws 248. N.C. Gen. Stat. § 7A-305(d), as amended, now provides:

> The following expenses, when incurred, are assessable or recoverable, as the case may be. *The expenses set forth in this subsection are complete and exclusive and constitute a limit on the trial court's discretion to tax costs pursuant to [N.C. Gen. Stat. §] 6-20:*
>
> (1) Witness fees, as provided by law.
>
> (2) Jail fees, as provided by law.
>
> (3) Counsel fees, as provided by law.

> (4) Expense of service of process by certified mail and by publication.
>
> (5) Costs on appeal to the superior court, or to the appellate division, as the case may be, of the original transcript of testimony, if any, insofar as essential to the appeal.
>
> (6) Fees for personal service and civil process and other sheriff's fees, as provided by law. . . .
>
> (7) Fees of mediators appointed by the court, mediators agreed upon by the parties, guardians ad litem, referees, receivers, commissioners, surveyors, arbitrators, appraisers, and other similar court appointees, as provided by law. The fee of such appointees shall include reasonable reimbursement for stenographic assistance, when necessary.
>
> (8) Fees of interpreters, when authorized and approved by the court.
>
> (9) Premiums for surety bonds for prosecution, as authorized by [N.C. Gen. Stat. §] 1-109.
>
> (10) Reasonable and necessary expenses for stenographic and videographic assistance directly related to the taking of depositions and for the cost o f deposition transcripts.
>
> (11) Reasonable and necessary fees of expert witnesses solely for actual time spent providing testimony at trial, deposition, or other proceedings.
>
> (12) The fee assessed pursuant to subdivision (2) of subsection (a) of this section upon assignment of a case to a special superior court judge as a complex business case.

N.C. Gen. Stat. § 7A-305(d) (2013) (emphasis supplied).

Recently, this Court recognized:

> Over the years, our case law took varied approaches in addressing issues concerning . . . the discretion to determine whether a particular type of expense may be taxed as a cost. Some opinions provided the trial court discretion

> to assess not only those "statutory" costs enumerated under section 7A-305(d), but also "common law" costs, or costs which were traditionally allowed at common law. Other opinions provided the trial court could only assess those costs enumerated by statute. *The General Assembly resolved the dispute by amending sections 6-20 and 7A-305(d) in 2007 to allow only those costs specifically authorized by statute, thereby eliminating any perceived discretion to tax "common law" costs.*

Khomyak, 214 N.C. App. at 58-59, 715 S.E.2d at 221 (emphasis supplied). *See Peters v. Pennington*, 210 N.C. App. 1, 25, 707 S.E.2d 724, 741 (2011) ("When [N.C. Gen. Stat. §§ 6-20 and 7A-305(d) are] read together, it is clear that costs require statutory authorization and that section 7A-305 or any other statute may authorize costs.").

Here, Plaintiff sought reimbursement for costs related to travel expenses in preparation for the trial that was to occur on 8 June 2011. The purported costs borne by Plaintiff included: (1) airline tickets; (2) meal expenses; (3) lodging; and, (4) a rental car. Plaintiff alleged she incurred these costs as to herself, as well as on behalf of her father and the children's visitation supervisor.

The trial court ordered Defendant to pay to Plaintiff $4,640.57 in court costs. The trial court did not cite any statutory authority, upon which it based its order. The travel expenses of a party and her non-subpoenaed witnesses are not assessable costs as set forth in N.C. Gen. Stat. § 7A-305(d), nor are these expenses otherwise recognized as an assessable cost "as provided by law." N.C. Gen. Stat. § 7A-305(d). *See City of Charlotte v. McNeely*, 281 N.C. 684, 694, 190 S.E.2d 179, 187 (1972) (holding "[n]o statute authorizes the inclusion of" mileage, meals, or hotel expenses "in court costs").

The trial court lacked the statutory authority to assess the travel expenses of Plaintiff and her non-subpoenaed witnesses as costs to be paid by Defendant. The trial court erred in awarding these expenses to Plaintiff as allowable costs. We reverse the trial court's order requiring Defendant to pay $4,640.57 in court expenses to Plaintiff.

B. Attorney's Fees

[2] Defendant argues the trial court abused its discretion in awarding Plaintiff attorney's fees in its 31 March 2014 order. We agree.

North Carolina adheres to the "American Rule" with regard to awards of attorney's fees. *Ehrenhaus v. Baker*, __ N.C. App. __, __, 776

S.E.2d 699, 704 (2015). Under this rule, each litigant is required to pay his or her attorney's fees, unless a statute or agreement between the parties provides otherwise. *In re King*, 281 N.C. 533, 540, 189 S.E.2d 158, 162 (1972).

N.C. Gen. Stat. § 50-13.6 expressly authorizes a trial court to award attorney's fees in child custody matters. N.C. Gen. Stat. § 50-13.6 provides:

> In an action or proceeding for the custody or support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for custody or support, or both, the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding . . . .

N.C. Gen. Stat. § 50-13.6 (2013).

In order to award attorney's fees in an action involving custody or support of a minor child, the trial court is required to gather evidence and make certain findings of fact. The trial court must first determine if the party moving for attorney's fees has satisfied the statutory requirements for an award pursuant to N.C. Gen. Stat. § 50-13.6.

The trial court must make specific findings of fact relevant to whether: "(1) the interested party acted in good faith; (2) he or she had insufficient means to defray the expenses of the action; and (3) the supporting party refused to provide adequate support under the circumstances existing at the time the action or proceeding commenced." *Leak v. Leak*, 129 N.C. App. 142, 151, 497 S.E.2d 702, 707, *disc. review denied*, 348 N.C. 498, 510 S.E.2d 385 (1998).

The trial court does not possess "unbridled discretion; it must find facts to support its award." *Burr v. Burr*, 153 N.C. App. 504, 506, 570 S.E.2d 222, 224 (2002) (citations omitted). The trial court must make findings of fact to support and show "the basis of the award, including: the nature and scope of the legal services, the skill and time required, and the relationship between the fees customary in such a case and those requested." *Robinson v. Robinson*, 210 N.C. App. 319, 337, 707 S.E.2d 785, 798 (2011) (citation omitted). The trial court is also required

to make findings to allocate and show what portion of the attorney's fees was attributable to the custody and child support aspects of the case. *Smith v. Price*, 315 N.C. 523, 538, 340 S.E.2d 408, 417 (1986).

Here, the trial court made two findings of fact in its order awarding attorney's fees to Plaintiff:

> 1. Plaintiff's attorney, Eric D. Levine, filed an Affidavit of Attorneys' [sic] Fees on January 15, 2014, which set out his total attorneys' [sic] fees during the entire case. The Affidavit of Attorneys' [sic] Fees of Eric D. Levine states that he had worked 269 hours. Mr. Levine bills his clients at the normal hourly rate of $200.00 per hour, which is fair and equitable considering his experience. The bills of Mr. Levine totaled $53,800.00.
>
> 2. Plaintiff did not have sufficient funds to defray the costs and expenses of this lawsuit, including attorneys' [sic] fees.

The trial court noticeably failed to make any findings whatsoever in its order with regard to whether Plaintiff acted in good faith and whether Defendant refused to provide adequate support. The record and transcript before this Court are also wholly devoid of any evidence submitted to show Plaintiff was unable to defray the costs of this action. The trial court's findings of fact, without more, are insufficient to support an award of attorney's fees to Plaintiff under N.C. Gen. Stat. § 50-13.6.

Additionally, the trial court failed to make sufficient findings of fact "upon which a determination of the requisite reasonableness can be based, such as findings regarding the nature and scope of the legal services rendered, the skill and time required, the attorney's hourly rate, and its reasonableness with that of other lawyers." *Cobb v. Cobb*, 79 N.C. App. 592, 595, 339 S.E.2d 825, 828 (1986) (citations omitted). Plaintiff's counsel's affidavit of attorney's fees included his hourly rate, but merely set forth various dates and hours spent working on this case, without delineating the nature of the work performed for each date.

The trial court failed to make the requisite findings regarding "the nature and scope of the legal services rendered" to support its award of attorney's fees. *Id.* We reverse the trial court's order awarding attorney's fees to Plaintiff and remand.

V. Conclusion

The trial court erroneously ordered Defendant to pay Plaintiff's and her unsubpoenaed witnesses' travel expenses, absent any statutory authority permitting these costs.

The trial court made insufficient findings of fact in support of its order awarding attorney's fees to Plaintiff. The trial court's findings of fact regarding the reasonableness of the amount of the attorney's fees award were also inadequate.

REVERSED AND REMANDED.

Judges CALABRIA and DAVIS concur.

ROBERT FUHS, SR., Plaintiff
v.
SUMMER FUHS, CONSTANCE C. MOORE and LEGAL AID OF NORTH CAROLINA, INC., DefendantS

No. COA15-945

Filed 16 February 2016

1. Malicious Prosecution—dismissal—special damages—not alleged

The trial court did not err by dismissing plaintiff's claim for malicious prosecution where plaintiff failed to allege special damages that were different from those which would necessarily result in all similar cases, a substantive element of the claim. Injury to a plaintiff's reputation and good name are not special damages and removing damaging information from the internet is a predictable result of alleged reputational damage.

2. Abuse of Process—summary judgment—use of existing proceeding

The trial court did not err by allowing defendants' motion for summary judgment as to his claim for abuse of process. The pleadings and other documents in the record showed that plaintiff could not prove the second essential element of this claim, that once a prior proceeding was initiated, defendant committed some willful act whereby he sought to use the existence of the proceeding to gain advantage of plaintiff in respect to a collateral matter.

FUHS v. FUHS

[245 N.C. App. 367 (2016)]

Appeal by plaintiff from order entered 22 January 2015 by Judge Stanley L. Allen, and order entered 16 June 2015 by Judge Lindsay R. Davis, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 27 January 2016.

Randolph M. James, P.C., by Randolph M. James, for plaintiff-appellant.

Poyner Spruill LLP, by T. Richard Kane, for defendant-appellees Constance C. Moore and Legal Aid of North Carolina, Inc.

TYSON, Judge.

Robert Fuhs, Sr. ("Plaintiff") appeals from: (1) order allowing Constance C. Moore's ("Defendant Moore") and Legal Aid of North Carolina, Inc.'s (collectively, "Defendants") motion to dismiss Plaintiff's malicious prosecution claim; and (2) order allowing Defendants' motion for summary judgment challenging Plaintiff's abuse of process claim. We affirm.

I. Factual Background

Plaintiff and Summer Fuhs ("Summer") were married on or about 1 May 2004, and lived in Guilford County, North Carolina. Two children were born of the marriage: a son, R.F., and a daughter, B.F. On or about 1 August 2012, Summer left the marital residence due to her "illicit sexual affair" with Doug Posey ("Posey"), a man she had met on a social media site, Facebook, and who lived in Macon County, North Carolina. A 10 August 2012 consent order confirmed Plaintiff and Summer agreed Plaintiff would have physical custody of both R.F. and B.F.

Much of Plaintiff's complaint describes numerous false allegations Summer and Posey made against Plaintiff prior to Defendants' involvement in this case. According to the complaint, the false allegations asserted by Summer and Posey included: (1) three reports to the Guilford County Department of Social Services ("DSS"), accusing Plaintiff of child neglect, alcoholism, and violence toward the minor children; one report also alleged Plaintiff's 15-year-old son from a previous marriage had engaged in "inappropriate sexual behaviors" with B.F.; (2) two attempted arrests, including one allegation of indecent liberties with his own daughter, B.F.; and (3) three actual arrests: one for aggravated assault on a female, one for communicating threats, and one for violation of a 50B Domestic Violence Protection Order.

All reports to DSS were investigated, returned as unfounded, and closed. All criminal charges were dismissed or resulted in verdicts of not guilty. Relevant portions of the above referenced allegations are presented in more detail as they relate to Defendants' involvement in this case.

A. Domestic Violence Complaint and Defendant's Involvement

On 26 June 2013, Summer "place[d] a 50B charge" against Plaintiff in Macon County (the "DVPO Case"). On 30 June 2013, Summer's grandmother posted a picture of B.F. on Facebook, and Plaintiff posted a public comment on the picture. As a result of Plaintiff's comment, Summer had Plaintiff arrested for violation of the 26 June 2013 domestic violence protection order. These charges were "immediately dismissed" by the Macon County District Attorney.

On 9 August 2013, Summer called the Macon County Sheriff's Department and alleged Plaintiff had engaged in inappropriate sexual conduct. According to Summer's allegations, Plaintiff, while intoxicated, made B.F. remove her clothes and he touched B.F. inappropriately. The Sheriff's Department investigated and concluded the allegations were unfounded, but nonetheless referred the case to DSS. DSS, in turn, conducted interviews and similarly concluded the allegations were unfounded.

On 15 August 2013, while Plaintiff was in Macon County defending the alleged violation of the 50B order, Plaintiff was served with a "First Amended Complaint Motion for Domestic Violence Order" (the "Amended Complaint") in the DVPO Case. The Amended Complaint was prepared by Defendant Moore in her capacity as Summer's attorney. At the time, Defendant Moore was serving as a staff attorney for Legal Aid of North Carolina, Inc. The second paragraph of the Amended Complaint drafted by Defendant Moore and signed by both Defendant Moore and Summer stated:

> On August 2, 2013, the minor child [B.F.], age 5, revealed to a Franklin Police Office [sic], Tony Hopkins, that when [Plaintiff] becomes intoxicated he takes [B.F.'s] pants off and touches her vaginal area. The minor child, [R.F.], age 8, has observed [Plaintiff] engaging in this behavior. These allegations are under investigation by [DSS]. Both children are afraid of retaliation from [Plaintiff] because of their statements.

Much of this allegation was repeated in a document entitled "Supplemental Pleading for [Summer's] Motion for Emergency Custody and Motion to Modify and Motion to Continue" ("Supplemental Pleading"), which was filed on 19 August 2013 in the pending child custody case between Plaintiff and Summer (the "Child Custody Case"). On 11 September 2013, a "Temporary Memorandum of Judgment/Order Without Prejudice" was filed in the Child Custody Case, and stated "that pending the DSS investigation [into Summer's 9 August 2013 allegations], [Summer] will have temporary custody" of R.F. and B.F.

After receiving the Amended Complaint, Plaintiff called Franklin Police Department Officer Tony Hopkins ("Officer Hopkins") to discuss the allegations made therein. During the course of their conversation, Officer Hopkins revealed to Plaintiff that B.F. had never made the allegations to him as was stated in the Amended Complaint. Defendant Moore later revealed she made no independent investigation and relied solely on Summer's statements in drafting the second paragraph of the Amended Complaint. On 24 October 2014, the DVPO Case against Plaintiff was dismissed.

Plaintiff filed the present lawsuit against Summer and Defendants in Guilford County Superior Court. Plaintiff alleged claims against each defendant of: (1) malicious prosecution; (2) abuse of process; (3) intentional infliction of emotional distress; (4) negligent infliction of emotional distress; (5) libel *per se*; and (6) slander *per se*. On 1 October 2014, the Guilford County Clerk of Superior Court entered default against Summer for failure to answer, plead, or otherwise appear in the lawsuit within the time permitted. Summer is not a party to this appeal.

Defendants filed an answer on 10 September 2014 and alleged Plaintiff's complaint failed to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. On 20 January 2015, the trial court allowed Defendants' motion to dismiss Plaintiff's claims for malicious prosecution and negligent and intentional infliction of emotional distress, but denied the motion to dismiss as to the abuse of process, libel and slander *per se* claims.

The case proceeded to discovery on Plaintiff's remaining claims. On 8 June 2015, the trial court granted Defendants' motion for summary judgment on all of Plaintiff's remaining claims. Plaintiff gave timely notice of appeal on 22 June 2015.

II. Issues

Plaintiff argues the trial court erred by: (1) allowing Defendants' motion to dismiss his claim of malicious prosecution; and (2) allowing Defendants' motion for summary judgment on his claim of abuse of process. Plaintiff has not asserted any argument regarding his other dismissed claims for negligent and intentional infliction of emotional distress, libel *per se* or slander *per se*. The trial court's orders are final concerning those claims.

III. Malicious Prosecution

[1] Plaintiff first argues the trial court erred in allowing Defendants' motion to dismiss his claim for malicious prosecution. We disagree.

A. Standard of Review

When we review the trial court's ruling on a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure,

> the standard of review is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. The complaint must be liberally construed, and the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief.

Holleman v. Aiken, 193 N.C. App. 484, 491, 668 S.E.2d 579, 584-85 (2008) (citation and quotation marks omitted). The Court considers Plaintiff's complaint "to determine whether, when liberally construed, it states enough to give the substantive elements of a legally recognized claim." *Governors Club, Inc. v. Governors Club Ltd. P'Ship*, 152 N.C. App. 240, 246, 567 S.E.2d 781, 786 (2002) (internal citations omitted), *aff'd per curiam*, 357 N.C. 46, 577 S.E.2d 620 (2003).

Dismissal is warranted "(1) when the face of the complaint reveals that no law supports plaintiffs' claim; (2) when the face of the complaint reveals that some fact essential to plaintiffs' claim is missing; or (3) when some fact disclosed in the complaint defeats plaintiffs' claim." *Walker v. Sloan*, 137 N.C. App. 387, 392, 529 S.E.2d 236, 241 (2000) (citation and quotation marks omitted).

The complaint is reviewed in the light most favorable to the nonmoving party. *Ford v. Peaches Entm't Corp.*, 83 N.C. App. 155, 156, 349

S.E.2d 82, 83 (1986). "[T]he trial court regards all factual allegations of the complaint as true. Legal conclusions, however, are not entitled to a presumption of truth." *Walker*, 137 N.C. App. at 392, 529 S.E.2d at 241. (citations omitted).

This Court "conducts a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A.*, 231 N.C. App. 70, 74, 752 S.E.2d 661, 663-64 (2013) (citation omitted).

B. Analysis

To assert a claim for malicious prosecution, a plaintiff must establish four elements: "that the defendant '(1) instituted, procured or participated in the criminal proceeding against [the] plaintiff; (2) without probable cause; (3) with malice; and (4) the prior proceeding terminated in favor of [the] plaintiff.' " *Hill v. Hill*, 142 N.C. App. 524, 537, 545 S.E.2d 442, 451 (Tyson, J., dissenting) (citing *Moore v. Evans*, 124 N.C. App. 35, 42, 476 S.E.2d 415, 421 (1996)), *rev'd for the reasons stated in dissenting opinion*, 354 N.C. 348, 553 S.E.2d 679 (2001); *see also Stanback v. Stanback*, 297 N.C. 181, 202, 254 S.E.2d 611, 625 (1979). In cases for malicious prosecution in which the earlier proceeding is civil, rather than criminal, in nature, our courts require a plaintiff to additionally plead and prove a fifth element: "special damages." *See Dunn v. Harris*, 81 N.C. App. 137, 139, 344 S.E.2d 128, 129 (1986).

In this case, the parties do not dispute Plaintiff's complaint alleges the second, third, and fourth elements of a malicious prosecution claim. The complaint on its face alleges a proceeding was instituted against Plaintiff without probable cause, with malice, and that the proceeding terminated in favor of Plaintiff.

Plaintiff argues the trial court erred in dismissing his claim because the allegations in his complaint were also sufficient to satisfy the first and fifth elements of a malicious prosecution claim. Presuming, without deciding, the allegations of the first were sufficient, we review whether Plaintiff's complaint sufficiently alleged special damages, the essential fifth element of malicious prosecution.

Special Damages

Our Supreme Court has held:

> [W]hen the plaintiff's claim for malicious prosecution is based on the institution of a prior civil proceeding against

> him he must show . . . that there was some arrest of his person, seizure of his property, or some other element of special damage resulting from the action such as would not necessarily result in all similar cases.

Stanback, 297 N.C. at 203, 254 S.E.2d at 625 (citations omitted). "[T]he requirement that a plaintiff show some special damage resulting from a prior lawsuit filed against him 'is an essential, substantive element of the claim.' " *Stikeleather v. Willard*, 83 N.C. App. 50, 51, 348 S.E.2d 607, 608 (1986) (citing *Stanback*, 297 N.C. at 204, 254 S.E.2d at 626).

Prior cases where our appellate courts have found special damages are instructive:

> The gist of such special damage is a substantial interference either with the plaintiff's person or his property such as causing execution to be issued against the plaintiff's person, causing an injunction to issue prohibiting plaintiff's use of his property in a certain way, causing a receiver to be appointed to take control of plaintiff's assets, causing plaintiff's property to be attached, or causing plaintiff to be wrongfully committed to a mental institution.

Stanback, 297 N.C. at 203, 254 S.E.2d at 625 (citations omitted). A plaintiff's allegation that he "suffered injury to his reputation, embarrassment, loss of work and leisure time and that he has incurred expenses in defending the claim" has been held to be insufficient to show special damages. *Stikeleather*, 83 N.C. App. at 52, 348 S.E.2d at 608.

Plaintiff argues the assertions in his complaint sufficiently alleged special damages. Plaintiff asserts the second paragraph in the Amended Complaint, drafted by Defendant Moore, which alleges Plaintiff sexually assaulted B.F., branded him as an "evil child molester," injured his reputation and good name, and required him to remove damaging information posted on the internet accusing him of a crime. Plaintiff also argues an interference with his person occurred because he was required to travel to, and attend, two hearings to defend the DVPO Case. We cannot agree. Plaintiff's allegations do not constitute or assert "special damages" as that term has been interpreted by controlling precedents.

This Court has held that injury to a plaintiff's reputation and good name are not special damages. *Stikeleather*, 83 N.C. App. at 52, 348 S.E.2d at 608. Removing damaging information from the internet is a predictable result of alleged reputational damage, and will almost always

"necessarily result in all similar cases." *Stanback*, 297 N.C. at 203, 254 S.E.2d at 625.

Likewise, having to travel to defend oneself will necessarily be the result in similar cases. Having to travel to court on two occasions is meaningfully different from causing execution to be issued against a plaintiff's person, causing a plaintiff to be wrongfully committed to a mental institution, and the other instructive examples of the kind of injuries which rise to special damages highlighted in *Stanback*. *Id.* at 203, 254 S.E.2d at 625.

Plaintiff has failed to allege special damages that are different from those which would "necessarily result in all similar cases," a substantive element of the claim of malicious prosecution. *Id.* Plaintiff's argument to the contrary is overruled. The trial court's ruling on Plaintiff's malicious prosecution claim is affirmed.

IV. Abuse of Process

[2] Plaintiff argues the trial court erred by allowing Defendants' motion for summary judgment as to his claim for abuse of process. We disagree.

A. Standard of Review

Summary judgment is proper where:

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.
>
> In a motion for summary judgment, the evidence presented to the trial court must be . . . viewed in a light most favorable to the non-moving party.
>
> An issue is "genuine" if it can be proven by substantial evidence and a fact is "material" if it would constitute or irrevocably establish any material element of a claim or a defense.
>
> A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim. Generally this means that on undisputed

> aspects of the opposing evidential forecast, where there is no genuine issue of fact, the moving party is entitled to judgment as a matter of law. If the moving party meets this burden, the non-moving party must in turn either show that a genuine issue of material fact exists for trial or must provide an excuse for not doing so.
>
> This Court reviews an order granting summary judgment *de novo*.

Hedgepeth v. Parker's Landing Prop. Owners Ass'n, ___ N.C. App. ___, ___ S.E.2d ___, 2016 N.C. App. LEXIS 47, at *6-7 (COA15-683 decided 5 January 2016) (citations and internal quotation marks omitted).

B. Analysis

Our Supreme Court has stated "abuse of process is the misuse of legal process for an ulterior purpose." *Fowle v. Fowle*, 263 N.C. 724, 728, 140 S.E.2d 398, 401 (1965). The claim "consists in the malicious misuse or misapplication of that process *after issuance* to accomplish some purpose not warranted or commanded by the writ." *Id.* (emphasis original).

> [A]buse of process requires both an ulterior motive and *an act* in the use of the legal process not proper in the regular prosecution of the proceeding, and that both requirements relate to the defendant's purpose to achieve through the use of the process some end foreign to those it was designed to effect. The ulterior motive requirement is satisfied when the plaintiff alleges that the prior action was initiated by defendant or used by him to achieve a collateral purpose not within the normal scope of the process used. The act requirement is satisfied when the plaintiff alleges that once the prior proceeding was initiated, the defendant committed some wilful act whereby he sought to use the existence of the proceeding to gain advantage of the plaintiff in respect to some collateral matter.

Stanback, 297 N.C. at 201, 254 S.E.2d at 625 (emphasis original) (internal quotations and citations omitted).

Viewed in the light most favorable to Plaintiff, his complaint fails to show any genuine issue of material fact, which would entitle him to relief on his claim of abuse of process. The pleadings and other documents in the record show Plaintiff cannot prove the second essential element of this claim.

The second essential element to support an abuse of process claim is the "act requirement," which is satisfied when the plaintiff shows "that once the prior proceeding was initiated, *the defendant committed some wilful act* whereby he sought to use the existence of the proceeding to gain advantage of the plaintiff in respect to some collateral matter." *Stanback*, 297 N.C. at 201, 254 S.E.2d at 625 (emphasis supplied). Here, Plaintiff's complaint alleges Defendants sought "temporary custody orders based upon the false allegations" in the DVPO case.

While the Supplemental Pleading in the Child Custody Case makes reference to and describes the underlying allegation of sexual abuse by Summer against Plaintiff, the Supplemental Pleading itself does not mention the Amended Complaint Defendant Moore drafted and signed in the DVPO Case. The record shows Summer was not represented by Defendants in the Child Custody Case, but rather employed a different attorney and law firm, Catherine F. Stalker Esq. ("Attorney Stalker") and Forrester Law Firm, to represent her in that proceeding.

Presuming, without deciding, Plaintiff made sufficient allegations to meet the "ulterior motive" requirement of an abuse of process claim, the pleadings and other documents clearly show Defendants did not commit "some wilful act" to use the existence of the Amended Complaint in the DVPO Case to gain an advantage over Plaintiff in a collateral proceeding, the Child Custody Case.

While the allegations presented in the second paragraph of the Amended Complaint were recounted in the Supplemental Pleading, the Amended Complaint is not mentioned. Further, it was Summer and Attorney Stalker, rather than Defendants, who drafted the Supplemental Pleading containing the same allegations, which was filed in the Child Custody Case. Plaintiff's arguments are overruled.

Counsel's Conduct and Duty

Our holdings regarding Plaintiff's failure to allege or show facts to support essential elements of both claims presented in this appeal should not be construed as condonation of Defendant Moore's or any other attorney's actions regarding these and the related actions which, if true, may violate the North Carolina Rules of Civil Procedure and the North Carolina Rules of Professional Conduct. *See* N.C. Gen. Stat. § 1A-1, Rule 11 (2013) ("The signature of an attorney. . . constitutes a certificate by him that he has read the pleading. . . ; that to the best of his knowledge, information, and belief *formed after reasonable inquiry* it is well grounded in fact[.] . . . If a pleading. . . is signed in violation

of this rule, the court. . . shall impose upon the person who signed it . . . an appropriate sanction[.]") (emphasis supplied); N.C. Rev. R. Prof. Conduct 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous."); *see also* N.C. Rev. R. Prof. Conduct 3.1, cmt. [2] ("The filing of an action or defense. . . taken for a client is not frivolous merely because the facts have not first been fully substantiated[.] . . . What is required of lawyers, however, is that they *inform themselves about the facts of their clients' cases*. . . and determine that they can make good faith arguments in support of their clients' positions.") (emphasis supplied).

V. Conclusion

The trial court properly granted Defendants' motion to dismiss Plaintiff's claim for malicious prosecution. Presuming, without deciding, Plaintiff alleged sufficient facts to satisfy the first four elements of a malicious prosecution claim, the damages Plaintiff alleged in his complaint would "necessarily result in all similar cases." *Stanback*, 297 N.C. at 203, 254 S.E.2d at 625. These allegations do not rise to the level of "special damages" required to support the essential fifth element of the claim for malicious prosecution. *Id.*

The trial court properly allowed Defendants' motion for summary judgment on Plaintiff's claim for abuse of process. No genuine issue of material fact exists and the pleadings clearly show Defendants did not willfully act to use the existence of the Amended Complaint to gain an advantage of Plaintiff in the Child Custody Case, a collateral matter. *Stanback*, 297 N.C. at 201, 254 S.E.2d at 625. Defendants were entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (2013).

The orders and judgments of the trial courts are affirmed.

AFFIRMED.

Judges CALABRIA and DAVIS concur.

HERON BAY ACQUISITION, LLC, PLAINTIFF
v.
UNITED METAL FINISHING, INC., CLAUDE T. CHURCH, AND CATHERINE H. CHURCH, DEFENDANTS

No. COA15-652

Filed 16 February 2016

1. Unfair Trade Practices—no-shop clause—sale of polluted property

The trial court did not err by granting summary judgment for defendants on plaintiff's claim for unfair and deceptive trade practices based on defendants' breach of a no-shop clause in an asset purchase agreement (APA) or its failure to disclose its discussions with others. Plaintiff failed to produce evidence of anything more than a simple breach of contract and produced no evidence that defendants' breach of the APA's no-shop clause caused any harm to plaintiff.

2. Contracts—implied covenant of good faith and fair doing—warranties about environmental status

The trial court did not err by granting summary judgment for defendants on plaintiff's claims for breach of contract predicated on defendants' alleged breach of the implied covenant of good faith and fair dealing in a failed transaction to sell a polluted industrial site, as well as an alleged breach of an Asset Purchase Agreement's provisions regarding defendants' warranties about the environmental status of United Metal Finishing and its associated real estate. Plaintiff's claim concerned a delayed report from a consultant, but those circumstances did not establish a prima facie case of violation of the covenant of good faith and fair dealing.

3. Contracts—asset purchase agreement—environmental warranties

Defendants did not breach an asset purchase agreement's provisions concerning environmental warranties in the failed sale of polluted property. Moreover, plaintiff was never exposed to potential liability because the sale did not take place.

4. Evidence—delayed consultant's report--excluded

The trial court did not err by granting defendants' motion *in limine* to exclude evidence that submission of a consultant's report was delayed until defendants had paid their consultant where plaintiff contended that this evidence was part of plaintiff's proof.

Appeal by plaintiff from orders entered 7 May 2014 and 30 September 2014, and judgment entered 10 November 2014, by Judge James L. Gale, Chief Special Superior Court Judge for Complex Business Cases, in Guilford County Superior Court. Heard in the Court of Appeals 18 November 2015.

Nancy Schleifer, for plaintiff-appellant.

Tuggle Duggins P.A., by Jeffrey S. Southerland, Denis E. Jacobson, and Sarah H. Negus, for defendants-appellees.

ZACHARY, Judge.

Heron Bay Acquisitions, Inc., (plaintiff) appeals from judgment entered on plaintiff's claims against United Metal Finishing, Inc., Claude Church, and Catherine Church (defendants). Plaintiff also appeals from pretrial orders granting partial summary judgment for defendants and granting defendants' motion *in limine* to exclude certain evidence. On appeal plaintiff argues that the trial court erred by dismissing his claims for unfair or deceptive trade practices, by dismissing plaintiff's claims for breach of contract based on violation of the covenant of good faith and fair dealing and violation of the contract's provisions regarding environmental warranties, and by granting defendants' motion to exclude evidence. We conclude that plaintiff's arguments lack merit and that the judgment should be affirmed.

I. Background

Plaintiff is an Ohio-based LLC owned by Scott Lowrie. United Metal Finishing is a metal plating business based in Greensboro and owned by defendant Claude Church. On 17 June 2011, the parties entered into an Asset Purchase Agreement (APA) and an accompanying real estate purchase contract in anticipation of plaintiff's purchase of United Metal Finishing and its associated real estate. The APA included provisions that (1) addressed defendants' representations about the property's environmental condition; (2) gave plaintiff the exclusive right to purchase United Metal Finishing, by preventing defendants from negotiating with other potential purchasers, and; (3) gave either buyer or seller the right to terminate the APA after 1 November 2011, if the sale of United Metal Finishing had not taken place by then. The APA stated that such termination would be without liability to either party, "provided however, that if such termination shall result from . . . a willful breach by any party to this Agreement, such party shall be fully liable for any and all losses,

costs, claims, or expenses, incurred or suffered by the other parties as a result of such failure or breach."

Because United Metal Finishing's metal plating business had caused pollution, the APA was structured around the "Brownfields" program, sponsored by the North Carolina Department of Natural Resources (DENR). Under the Brownfields program, a purchaser of contaminated land who enters into a Brownfields Agreement with DENR is absolved of liability for historic contamination. The APA made the acquisition of a Brownfields Agreement a prerequisite to the sale of United Metal Finishing. It typically takes between eighteen and twenty-four months to obtain a Brownfields Agreement with DENR. *See Paradigm Fin. Group, Inc. v. Church*, 2014 NCBC 16, *12 (2014) (companion case) (unpublished). As of 1 November 2011, the parties had not obtained a Brownfields Agreement or closed on the sale of United Metal Finishing. Under the terms of the APA, either party was free to terminate the APA after this date.

Defendants terminated the APA on 17 February 2012, at which time DENR had yet to prepare a draft Brownfields Agreement. On 16 April 2012, plaintiff filed suit against defendants, seeking damages for breach of contract, breach of the implied covenant of good faith and fair dealing, and specific performance of the APA. On 16 April 2012, the case was designated a Complex Business Case and assigned to the trial court. During discovery, plaintiff obtained information suggesting that after the parties signed the APA, defendants had discussions with other parties about the possibility of selling United Metal Finishing to a buyer other than plaintiff. After learning this, plaintiff filed an amended complaint which dropped the claim for specific performance and added a claim for violation of the Unfair or Deceptive Trade Practices Act (UDTPA claim), based on defendants' violation of § 4.1.7 of the APA. This provision, known as a "no-shop clause," stated that after signing the APA and until closing or termination of the agreement, defendants would not

> directly or indirectly solicit or engage in negotiations or discussions with, disclose any of the terms of this Agreement to, accept any offer from, furnish any information to, or otherwise . . . participate with, any person or organization . . . regarding any offer or proposal with respect to the acquisition . . . of the Business . . . [and] will promptly notify Purchaser of any such discussion, offer, or proposal. . . .

On 2 December 2013, the parties filed cross-motions for summary judgment. Following a hearing conducted on 20 February 2014, the trial

court entered an order on 7 May 2014 denying plaintiff's motion for summary judgment, and granting partial summary judgment for defendants. The trial court entered summary judgment for defendants on plaintiff's claims for UDTPA based on violation of the no-shop clause, and its claims for breach of contract based on defendants' alleged violation of environmental warranties in the APA, undue delay of the Brownfields process, and breach of the implied covenant of good faith and fair dealing. The trial court denied defendant's motion for summary judgment on plaintiff's claims for breach of contract based on defendants' violation of the no-shop clause, failure to report customer concerns, and unauthorized purchase of equipment, and plaintiff's UDTPA claim based on defendants' misappropriation of a marketing brochure prepared by plaintiff. On 30 September 2014 the trial court granted defendants' motion *in limine* to exclude evidence of defendants' late payments to an environmental consultant, and defendants' post-termination discussions with prospective buyers of United Metal Finishing.

The trial on plaintiff's remaining claims began on 8 October 2014. On 16 October 2014, the jury returned verdicts finding that (1) defendants United Metal Finishing and Claude Church, but not Catherine Church, had breached the no-shop provision of the APA; (2) defendants' termination of the APA did not result from the breach of the no-shop provision; (3) defendants had misappropriated marketing materials created and owned by plaintiff; and (4) plaintiff was entitled to $500.00 in damages for defendants' misappropriation of plaintiffs' marketing materials. On 14 November 2014, the trial court entered judgment in accordance with the jury's verdicts. On 4 December 2014, plaintiff appealed from the judgment, the summary judgment order, and the order on defendants' motion *in limine*.

II. UDTPA Claim Based on Violation of the APA's No-Shop Clause

Plaintiff argues first that the trial court erred by granting summary judgment for defendants on plaintiffs' claim seeking damages for UDTPA based on defendants' violation of the APA's no-shop clause and defendants' "deception" about the violation. We conclude that plaintiff's argument lacks merit.

A. Standard of Review

Pursuant to N.C. Gen. Stat. § 1A-1, Rule 56(c) (2013), summary judgment is properly entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." "According to

well-established North Carolina law, summary judgment is appropriate when 'a claim or defense is utterly baseless in fact' or 'where only a question of law on the indisputable facts is in controversy.' " *Williams v. Houses of Distinction, Inc.*, 213 N.C. App. 1, 4, 714 S.E.2d 438, 440 (2011) (quoting *Kessing v. Mortgage Corp.*, 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971) (internal citations omitted). "All facts asserted by the [nonmoving] party are taken as true and . . . viewed in the light most favorable to that party[.]" *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (citations omitted). "[O]nce the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial." *Pacheco v. Rogers & Breece, Inc.*, 157 N.C. App. 445, 448, 579 S.E.2d 505, 507 (2003) (internal quotation omitted). "Our standard of review of an appeal from summary judgment is *de novo*[.]" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation omitted).

B. Discussion

[1] Plaintiff appeals from the trial court's summary judgment order dismissing his UDTPA claim. On appeal, plaintiff does not argue that there are genuine issues of material fact, but that the undisputed facts did not entitle defendants to summary judgment. We disagree.

N.C. Gen. Stat. § 75-1.1(a) (2013) provides that "unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." The elements of an unfair or deceptive trade practice are: "(1) an unfair or deceptive act or practice by [the] defendant, (2) in or affecting commerce, (3) which proximately caused actual injury to [the] plaintiff." *Wilson v. Blue Ridge Elec. Membership Corp.*, 157 N.C. App. 355, 357, 578 S.E.2d 692, 694 (2003). "It is well recognized that actions for unfair or deceptive trade practices are distinct from actions for breach of contract. Our Supreme Court has also determined that, as to these elements, 'some type of egregious or aggravating circumstances must be alleged and proved before the [Act's] provisions may [take effect].' " *Carcano v. JBSS, LLC*, 200 N.C. App. 162, 171, 684 S.E.2d 41, 49 (2009) (quoting *Business Cabling, Inc. v. Yokeley*, 182 N.C. App. 657, 663, 643 S.E.2d 63, 68, *disc. rev. denied*, 361 N.C. 567, 650 S.E.2d 599 (2007) (internal quotation omitted)) (other citation omitted). Moreover, "[r]ecovery will not be had . . . where the complaint fails to demonstrate that the act of deception proximately resulted in some adverse impact or actual injury to the plaintiffs." *Walker v. Sloan*, 137 N.C. App. 387, 399, 529 S.E.2d 236, 245 (2000) (citing *Miller v. Ensley*, 88 N.C. App. 686, 365 S.E.2d 11 (1988)).

For example, in *Melton v. Family First Mortgage Corp.*, 156 N.C. App. 129, 135, 576 S.E.2d 365, 370, *aff'd per curiam*, 357 N.C. 573, 597 S.E.2d 672 (2003), the plaintiff filed an UDTPA claim against the defendant based on a contention that the defendant had improperly backdated loan application documents. This Court upheld summary judgment for the defendant:

> Assuming that the loan application documents were backdated, however, plaintiff has failed to present any evidence of harm. As stated previously, a necessary element for a claim under N.C. Gen. Stat. § 75-1.1 is that the unfair or deceptive act or practice proximately caused actual injury to the claimant.

(citation omitted). Our review of the record indicates that plaintiff did not produce evidence that defendants engaged in an unfair or deceptive act or practice, or that plaintiff suffered damages from defendants' alleged wrongdoing. Plaintiff's UDTPA claim is based upon defendant's violation of the no-shop clause of the APA.[1] Absent this contractual provision, however, defendants would have been free to discuss possible business dealings with others as they saw fit and without any obligation to disclose such discussions to plaintiff. In addition, plaintiff identifies no aggravating circumstances that might elevate this breach of contract to a UDTPA claim. " 'Substantial aggravating circumstances' must attend the breach in order to recover under the Act. A violation of Chapter 75 is unlikely to occur during the course of contractual performance, as these types of claims are best resolved by simply determining whether the parties properly fulfilled their contractual duties." *Mitchell v. Linville*, 148 N.C. App. 71, 75, 557 S.E.2d 620, 623-24 (2001) (quoting *Branch Banking and Trust Co. v. Thompson*, 107 N.C. App. 53, 62, 418 S.E.2d 694, 700, *disc. review denied*, 332 N.C. 482, 421 S.E.2d 350 (1992) (internal quotation omitted)), and citing *Eastover Ridge, L.L.C. v. Metric Constructors, Inc.*, 139 N.C. App. 360, 368, 533 S.E.2d 827, 833, *disc. review denied*, 353 N.C. 262, 546 S.E.2d 93 (2000)). Plaintiff has failed to produce evidence of anything more than a simple breach of contract.

In addition, plaintiff produced no evidence that defendants' breach of the APA's no-shop clause caused any harm to plaintiff. There is no evidence that defendants' contacts with other parties led to an agreement between defendants and another business entity, and plaintiff

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1. Plaintiff contends on appeal that its "UDTPA claim is based on deception and not on the contractual claim." Plaintiff's allegations of deception, however, relate solely to defendants' failure to disclose violations of the no-shop clause.

does not allege that, for example, defendants tried to renegotiate the APA with plaintiff, demanded a higher purchase price from plaintiff, or attempted to use the possible interest of other parties as leverage to obtain concessions from plaintiff. Indeed, it is undisputed that plaintiff was unaware of defendants' conversations with other possible buyers until after plaintiff had filed suit against defendants. Moreover, the jury found that defendants' termination of the APA did not result from defendants' violation of the no-shop clause, barring relitigation of this issue in the context of an UDTPA claim:

> Under the . . . doctrine of collateral estoppel, also known as 'estoppel by judgment' or 'issue preclusion,' the determination of an issue in a prior judicial or administrative proceeding precludes the relitigation of that issue in a later action, provided the party against whom the estoppel is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding.

Whitacre P'ship v. BioSignia, Inc., 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004) (citing *Thomas M. McInnis & Assocs. v. Hall*, 318 N.C. 421, 434, 349 S.E.2d 552, 560 (1986)) (other citation omitted). Defendants' discussions with other possible buyers, while a technical violation of the no-shop clause, do not appear to have resulted in any change in the parties' relationship. We conclude that plaintiff has failed to articulate any damages resulting from defendants' breach of the no-shop clause. Because plaintiff failed to produce evidence that defendants engaged in an unfair or deceptive act or practice, that defendants' violation of the no-shop clause was accompanied by aggravating circumstances, or that plaintiff was harmed by defendants' breach of contract, the trial court did not err by granting summary judgment for defendants on plaintiff's UDTPA claim based on defendants' violation of the no-shop clause.

In reaching this conclusion, we have carefully considered plaintiff's arguments for a contrary result. Plaintiff argues that it produced evidence of damages consisting of (1) the business expenses plaintiff incurred in pursuing the APA and trying to obtain a Brownfields Agreement, and (2) the "lost profits" that plaintiff might have made if defendants had not terminated the APA. " 'The word 'damages' is defined as compensation which the law awards for an injury[;] 'injury' meaning a wrongful act which causes loss or harm to another.' " *Tyll v. Berry*, __ N.C. App. __, __, 758 S.E.2d 411, 420 (quoting *Cherry v. Gilliam*, 195 N.C. 233, 235, 141 S.E. 594, 595 (1928)), *disc. review denied*, 367 N.C. 532, 762 S.E.2d 207 (2014). Plaintiff fails to advance a persuasive argument to explain why its ordinary expenses or hypothetical lost profits were "damages"

resulting from a wrongful act of defendants, given that the jury found that defendants' termination of the APA did not result from defendants' breach of contract. Plaintiff's assertion that it suffered damages lacks merit.

We have also reviewed the cases cited by plaintiff and conclude that they are easily distinguishable and do not require reversal of the trial court's dismissal of plaintiff's UDTPA claim based on violation of the no-shop clause. In *Atlantic Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 507 S.E.2d 56 (1998), the plaintiff purchased accounts "consisting of the right to receive payment from owners of rental property in exchange for management services." *Atlantic*, 131 N.C. App. at 244, 507 S.E.2d at 59. The defendant learned prior to closing that certain clients planned to hire a different management company, but failed to reveal this to plaintiff until after the closing. There was no dispute over the existence of damages, and the defendant intentionally concealed a fact that was material to the plaintiff's decision to proceed with the purchase. In *Walker v. Sloan*, the defendants engaged in a variety of dishonest and, in some cases, illegal acts. Significantly, in *Walker*, this Court upheld summary judgment in favor of one of the defendants on the grounds that because the proposed transaction failed to occur, "[plaintiffs] cannot show any actual injury resulting from the [defendant's] alleged omission [of material facts]." *Walker*, 137 N.C. App. at 400, 529 S.E.2d at 246. In this case, defendants' conversations with other possible buyers did not lead to an agreement between defendants and another party, or result in a change in plaintiff's status. We conclude that the trial court did not err by granting summary judgment for defendants on plaintiff's claim for UDTPA based on defendants' breach of the no-shop clause or its failure to disclose its discussions with others.

III. Breach of Contract

[2] Plaintiff argues next that the trial court erred by granting summary judgment for defendants on plaintiff's claims for breach of contract predicated on defendants' alleged breach of the implied covenant of good faith and fair dealing, and breach of the APA's provisions regarding defendants' warranties as to the environmental status of United Metal Finishing and its associated real estate. We disagree.

A. Breach of the Implied Covenant of Good Faith and Fair Dealing

" 'In every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement.' " *Bicycle Transit Authority v. Bell*, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985) (quoting

Brown v. Superior Court, 34 Cal. 2d 559, 564, 212 P.2d 878, 881 (1949)). In this case, plaintiff's claim for breach of the implied covenant of good faith and fair dealing is based on the following: (1) in October 2011 the environmental consultant hired by defendants was ready to file required documents with DENR as part of the parties' pursuit of a Brownfields Agreement, but (2) the consultant delayed filing the documents for several days, until defendants had paid a past due bill owed to the consultant. We conclude that these circumstances do not establish a *prima facie* case of violation of the covenant of good faith and fair dealing.

Plaintiff cites *Quantum Communs. Corp. v. Star Broad., Inc.*, 473 F. Supp. 2d 1249 (S.D. Fla. 2007), *aff'd*, 290 Fed. Appx. 324 (11th Cir. Fla. 2008), in support of its argument. *Quantum* is not binding on this Court and we conclude that it is not persuasive, given that it involves a very different factual and legal situation. The parties in *Quantum* executed an APA with a no-shop clause and a clause allowing termination of the APA if the relevant transaction had not closed by a certain date. Unlike the APA in this case, however, the termination clause in *Quantum* provided that a party could not terminate the APA if it was in breach of its terms. After the defendant terminated the APA, the plaintiff sought specific performance and argued that, because the defendant had violated the no-shop clause before it terminated the APA, the purported termination was invalid. In this context, determination of whether the defendant had violated the no-shop clause was essential to establishing plaintiff's entitlement to specific performance. In addition, correspondence between the defendant and another party indicated defendant's intention to deliberately sabotage the APA in order to contract with the other party. In the present case, however, defendants' breach of the no-shop clause did not invalidate defendants' termination of the APA, absent proof that the termination resulted from the breach. Moreover, plaintiff does not seek specific performance, and there is no evidence that defendants had an agreement with another party. We conclude that the *Quantum* case does not persuade us to reverse the trial court.

Plaintiff speculates that defendants had an improper motive for this brief delay, but does not support this conjecture with evidence. Plaintiff also fails to articulate any way in which this brief delay affected the sequence of events, inasmuch as DENR did not begin reviewing the documents for several weeks after they were submitted, and had not yet drafted a Brownfields Agreement when defendants terminated the APA three months later. Plaintiff identifies no evidence that defendants gained an advantage or that plaintiff suffered damages as a result of the delay in submitting documents to DENR. The trial court did not err

by granting summary judgment for defendants on plaintiff's claim for breach of the implied covenant of good faith and fair dealing.

B. Breach of the APA's Environmental Warranties

[3] The trial court stated in its summary judgment order that:

> . . . [United Metal Finishing] and the Churches made representations and undertook indemnity obligations in the [APA] to protect Heron Bay's post-acquisition liabilities. . . . [United Metal Finishing] represented that: (1) no hazardous materials were used in the business; (2) no hazardous materials were released on the Property; (3) [United Metal Finishing] was in compliance with all relevant environmental laws; (4) Defendants would comply with all relevant environmental laws going forward [and]; (5) Defendants knew of no liabilities resulting from environmental violations[.] . . . Defendants promised to indemnify Plaintiff for any liability resulting from Defendants' failures to comply with these representations.
>
> Any remedy for inaccurate representations was limited by the "Environmental Exceptions" listed in the APA and RPA, which provide that Defendants would indemnify Heron Bay for any liability it incurred as a result of environmental breaches for which Heron Bay would not receive Brownfield immunity.

Plaintiff argues that defendants breached the APA's provisions concerning environmental warranties. However, because the sale of United Metal Finishing did not take place, plaintiff was never exposed to potential liability based on defendants' alleged breach of these contractual provisions. This argument lacks merit.

IV. Motion *in Limine*

[4] Plaintiff's final argument is that the trial court erred by granting defendants' motion *in limine* to exclude evidence that submission of the Brownfields materials was delayed until defendants had paid their consultant. Plaintiff contends that this evidence was part of plaintiff's proof for both the UDTPA claim and the claim for breach of the implied covenant of good faith and fair dealing. As discussed above, we conclude that the trial court did not err by granting summary judgment for defendants on plaintiff's claim for breach of the implied covenant of good faith and fair dealing, based on defendants' delay in paying the

consultant. We have also held that the trial court did not err by granting summary judgment for defendants on plaintiff's UDTPA claim; consideration of the evidence regarding defendants' late payments does not persuade us to reach a different conclusion. In addition, plaintiff advances no argument regarding the standard for admissibility of such evidence. We conclude that this argument lacks merit.

For the reasons discussed above, we conclude that the trial court did not err and that its judgment and orders should be

AFFIRMED.

Judges CALABRIA and ELMORE concur.

IN THE MATTER OF HOUSE, CLAIM FOR COMPENSATION UNDER THE NORTH CAROLINA EUGENICS ASEXUALIZATION AND STERILIZATION COMPENSATION PROGRAM, CLAIMANT-APPELLANT

No. COA15-879

Filed 16 February 2016

Public Health—eugenics—sterilization—noncompliance with statute

The North Carolina Industrial Commission's finding that claimant was involuntarily sterilized on 27 November 1974 was affirmed where the only legislation in effect at the time authorizing claimant's sterilization was the Eugenics Act and there was no evidence of compliance with the Act.

Appeal by Claimant from amended decision and order entered 11 May 2015 by the North Carolina Industrial Commission. Heard in the Court of Appeals 30 November 2015.

The Bollinger Law Firm, PC, by Bobby L. Bollinger, Jr., for Claimant-Appellant.

Attorney General Roy Cooper, by Assistant Attorney General Marc X. Sneed, for North Carolina Department of Justice, Tort Claims Section.

McGEE, Chief Judge.

The North Carolina Industrial Commission ("the Industrial Commission") found that Ms. House[1] ("Claimant") was involuntarily sterilized on 27 November 1974. The Industrial Commission based this finding in part on Claimant's testimony of 7 August 2014. Claimant testified that a Cleveland County Department of Social Services ("DSS") worker accompanied her to Cleveland Memorial Hospital in Shelby to obtain an abortion and a tubal ligation. Claimant testified:

> [The DSS worker] gave [the doctor] some papers to be signed, and [the doctor] asked me if I wanted to have an abortion. I said, "Yes, sir, but, no, sir," and [the doctor] asked me what I meant, and I told him that the [DSS] worker – that I couldn't keep my two daughters if I didn't have an abortion, and [the doctor] told [the DSS worker] that he could not do it under those circumstances, and so – which we went out in the hall. [The DSS worker] beat me against the wall and told me again that if I did not have this done, I would lose my two girls, and so she took me home. . . . . And I went home and I cried all night, and I went back the next day, and because the Department of Social Services had custody of me, I had to have the surgery done.

The Industrial Commission found:

> 4. Ms. House's medical records that were included in the record indicate that she was taken by "the Social Service people" to Cleveland Memorial Hospital in Shelby, North Carolina, in November 1974. Ms. House was nine weeks pregnant at the time. The history and physical examination note by Dr. W.J. Collins states that Ms. House . . . was a "22 year old white married female . . . is pregnant and desires interruption. She also requests sterilization." A subsequent medical note states that she underwent a "vaginal tubal and therapeutic D & C." This note also separately describes the procedures as "therapeutic D & C, bilateral partial salpingectomy." The procedures took place on 27 November 1974, resulting in the abortion of her nine-week old, unborn child.
>
> 5. Ms. House testified that a social worker with the Department of Social Services coerced her into having the

1. We avoid using the full name of Claimant in order to protect her anonymity.

> abortion and sterilization procedures. She testified that the social worker threatened that she couldn't keep her two living daughters if she did not have the procedures. Ms. House further testified that the social worker beat her against a wall while threatening her with the loss of her two daughters.
>
> 6. A sworn and notarized letter was submitted in this matter by Barbara Neelands of Kings Mountain, North Carolina, which was received by former Deputy Commissioner Goodson and included in Ms. House's file. In this letter, Ms. Neelands states that Ms. House lived in her household from 1973 to 1975. The remaining substance of Ms. Neelands['] letter basically confirms the claims of Ms. House that a social worker . . . did threaten Ms. House with losing her two daughters if she did not undergo the abortion and sterilization procedures.

In 2013, the General Assembly enacted the Eugenics Asexualization and Sterilization Compensation Program ("the Compensation Program"), N.C. Gen. Stat. § 143B-426.50 *et seq.*, in order to provide compensation to individuals asexualized or sterilized pursuant to the North Carolina eugenics laws. The Compensation Program defined a "qualified recipient" under the Compensation Program as "[a]n individual who was asexualized involuntarily or sterilized involuntarily under the authority of the Eugenics Board of North Carolina in accordance with Chapter 224 of the Public Laws of 1933 or Chapter 221 of the Public Laws of 1937." N.C. Gen. Stat. § 143B-426.50(5) (2013).

Chapter 221 of the Public Laws of 1937 related to the temporary admission of "patients" to State hospitals "for the purpose of sterilization," and is not relevant to the present appeal. 1937 N.C. Public Laws, ch. 221. Chapter 224 of the Public Laws of 1933, as amended by Chapter 463 of the Public Laws of 1935, ("the Eugenics Act"), stated in relevant part:

> Sec. 2. It shall be the *duty* of the board of commissioners of any county of North Carolina, at the public cost and expense, to have one of the operations described in Section 1 of this act [asexualization or sterilization] performed upon any mentally diseased, feeble-minded or epileptic resident of the county . . . upon the request and petition of the superintendent of public welfare or other similar public official performing in whole or in part the functions of such superintendent, or of the next of kin,

or the legal guardian of such mentally defective person: *Provided, however*, that *no operation described in this section shall be lawful unless and until the provisions of this act shall be first complied with.*

Sec. 3. No operation under this act shall be performed by other than a duly qualified and registered North Carolina physician or surgeon, and by him only upon a written order signed after complete compliance with the procedure outlined in this act by the responsible executive head of the institution or board, or the superintendent of public welfare, or other similar official performing in whole or in part the functions of such superintendent, or the next of kin or legal guardian having custody or charge of the feebleminded, mentally defective or epileptic inmate, patient or non-institutional individual.

Sec. 4. . . . . If the person to be operated upon is not an inmate of any . . . public institution, then the superintendent of welfare or such other official performing in whole or in part the functions of such superintendent of the county of which said . . . non-institutional individual to be sterilized is a resident, shall be the prosecutor. *It shall be the duty of such prosecutor* promptly to institute proceedings as provided by this act in any or all of the following circumstances:

1. When in his opinion it is for the best interest of the mental, moral or physical improvement of the . . . non-institutional individual, that he or she be operated upon.

2. When in his opinion it is for the public good that such . . . non-institutional individual be operated upon.

3. When in his opinion such . . . non-institutional individual would be likely, unless operated upon, to procreate a child or children who would have a tendency to serious physical, mental, or nervous disease or deficiency.

4. When requested to do so in writing by the next of kin or legal guardian of such . . . non-institutional individual.

. . . .

Sec. 5. There is hereby created the Eugenics Board of North Carolina. All proceedings under this act shall be begun before the said Eugenics Board. . . . .

. . . .

Sec. 8. Proceedings under this act shall be instituted by the petition of said petitioner to the Eugenics Board. Such petition shall be in writing, signed by the petitioner and duly verified by his affidavit to the best of his knowledge and belief. It shall set forth the facts of the case and the grounds of his opinion. The petition shall also contain a statement of the mental and physical status of the patient verified by the affidavit of at least one physician who has had actual knowledge of the case[.] . . . . The prayer of said petition shall be that an order be entered by said Board authorizing the petitioner to perform, or to have performed by some competent physician or surgeon . . . the operation of sterilization or asexualization as specified in Section one of this act which shall be best suited to the interests of the said . . . patient or to the public good.

. . . .

Sec. 10. The said Board at the time and place named in said notice . . . shall proceed to hear and consider the said petition and evidence offered in support of and against the same[.] . . . . A stenographic transcript of the proceedings at such hearings duly certified by the petitioner and the . . . individual resident, or his guardian or next of kin, or the solicitor, shall be made and preserved as part of the records of the case.

Sec. 11. The said board may deny the prayer of the said petition or if, in the judgment of the board, the case falls within the intent and meaning of one of more of the circumstances mentioned in Section 4 of this act, and an operation of asexualization or sterilization seems to said board to be for the best interest of the mental, moral or physical improvement of the said . . . individual resident or for the public good, *it shall be the duty of the board to approve said recommendation* in whole or in part[.] . . . .

Sec. 12. . . . . If the . . . individual resident, or the next of kin, legal guardian, solicitor of the county, and guardian appointed as herein provided, after the said hearing *but not before*, shall consent in writing to the operation as ordered by the board, such operation shall take place at such time as the said prosecutor petitioning shall designate.

. . . .

> Sec. 18. Records in all cases arising under this act shall be filed permanently with the secretary of the said Eugenics Board. . . . .

1933 N.C. Public Laws, ch. 224 (some emphasis added); 1935 N.C. Public Laws, ch. 463, § 2. Unlike other state eugenics programs, "North Carolina [was] the only state that *require[d]* public officials, specifically directors of state institutions and county directors of social services, to petition . . . for the sterilization of the mentally disabled." Joe Zumpano-Canto, *Nonconsensual Sterilization of the Mentally Disabled in North Carolina: An Ethics Critique of the Statutory Standard and Its Judicial Interpretation*, 13 Journal of Contemporary Health Law & Policy, Issue 1, 84 (1996) (emphasis added).

Claimant was involuntarily sterilized on 27 November 1974. At that time, there were two statutes authorizing sterilization of individuals in Claimant's position: (1) N.C. Gen. Stat. § 90-271 and (2) N.C. Gen. Stat. § 35-37.

N.C. Gen. Stat. § § 90-271, which is still in effect, authorized the *voluntary* sterilization of adults or married juveniles, provided a written request was

> made by such person prior to the performance of such surgical operation, and provided, further, that prior to or at the time of such request a full and reasonable medical explanation is given by such physician or surgeon to such person as to the meaning and consequences of such operation[.]

N.C. Gen. Stat. § 90-271 (2013). This legislation was entitled, in part, "An Act to Make it Clear that Physicians and Surgeons are Authorized to Perform Certain Operations upon the Reproductive Organs of Certain Persons when Requested to do so[.]" 1963 N.C. Sess. Laws, ch. 600. The purpose of that act, in part, was to provide statutory protections for physicians who sterilized *consenting* adults. In order to operate within the requirements of N.C. Gen. Stat. § 90-271, the consent had to be informed, willing, and in writing. In the matter before us, there is no record evidence of written consent for the operation performed. Further, the Industrial Commission found as fact that the sterilization in this case was involuntary.

The only other statute that was in effect in 1974 authorizing sterilization of adults in situations similar to that of Claimant was N.C. Gen. Stat.

§ 35-37. This statute allowed the *involuntary* sterilization of non-institutionalized people in certain circumstances. N.C. Gen. Stat. § 35-37 was the general statute successor to Section 2 of Chapter 224 of the Public Laws of 1933. At the time that Claimant was involuntarily sterilized, N.C. Gen. Stat. § 35-37 had been amended to read as follows:

> Operations on Mental Defectives Not in Institutions. It shall be the duty of the board of commissioners of any county of North Carolina, at the public cost and expense, to have one of the operations described in § 35-36, performed upon any mentally diseased or feeble-minded resident of the county, not an inmate of any public institution, upon the request and petition of the director of [social services] or other similar public official performing in whole or in part the functions of such director, or of the next of kin, or the legal guardian of such mentally defective person: Provided, however, that no operation described in this Section shall be lawful unless and until the provisions of this Article shall be first complied with.

N.C. Gen. Stat. § 35-37 (1973); 1967 N.C. Sess. Laws, ch. 138, § 2. N.C. Gen. Stat. § 35-36 was also amended in 1967 and defined the relevant "operations" as follows: "[A]sexualization, or sterilization, performed upon any mentally diseased or feeble-minded [individual], as may be considered best in the interest of the mental, moral, or physical improvement of the [individual], or for the public good[.]" N.C. Gen. Stat. § 35-36 (1973); 1967 N.C. Sess. Laws, ch. 138, § 1. N.C. Gen. Stat. § 35-38 was amended in 1967 to the following:

> Restrictions on Such Operations. No operation under this Article shall be performed by other than a duly qualified and registered North Carolina physician or surgeon, and by him only upon a written order signed after complete compliance with the procedure outlined in this Article by the responsible executive head of the institution or board, or the director of social services, or other similar official performing in whole or in part the functions of such director, or the next of kin or legal guardian having custody or charge of the feeble-minded or mentally defective inmate, patient or non-institutional individual.

N.C. Gen. Stat. § 35-38 (1973); 1967 N.C. Sess. Laws 138, § 3. N.C. Gen. Stat. § 35-39 stated in relevant part:

> If the person to be operated upon is not an inmate of any . . . public institution, then the director of social services or such other official performing in whole or in part the functions of such director of the county of which said . . . non-institutional individual to be sterilized is a resident, shall be the prosecutor.
>
> It shall be the duty of such prosecutor promptly to institute proceedings as provided by this Article in any of the following circumstances:
>
> 1. When in his opinion it is for the best interest of the mental, moral or physical improvement of the . . . non-institutional individual, that he or she be operated upon.
>
> 2. When in his opinion it is for the public good that such . . . non-institutional individual be operated upon.
>
> 3. When in his opinion such . . . non-institutional individual would be likely, unless operated upon, to procreate a child or children who would have a tendency to serious physical, mental, or nervous disease or deficiency.
>
> 4. When requested to do so in writing by the next of kin or legal guardian of such . . . non-institutional individual.

N.C. Gen. Stat. § 35-39 (1973). According to N.C. Gen. Stat. § 35-43: "Proceedings under this article shall be instituted by the petition of said petitioner to the Eugenics [Board].[2] Such petition shall be in writing, signed by the petitioner and duly verified by his affidavit to the best of his knowledge and belief." N.C. Gen. Stat. § 35-43 (1973). Further, the Eugenics Act required that

> [a] copy of said petition, duly certified by the Secretary of Human Resources to be correct, must be served upon the . . . individual resident, together with a notice in writing signed by the Secretary of Human Resources designating the time and place not less than 20 days before the presentation of such petition to said Eugenics [Board] when and where said [Board] will hear and pass upon such petition.

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2. The Eugenics Act was amended effective 1 July 1973 to replace the term "Eugenics Board" with the term "Eugenics Commission." 1973 N.C. Sess. Laws 476, § 133.3. For consistency, we shall always refer to this entity as the "Eugenics Board."

N.C. Gen. Stat. § 35-44 (1973). Following the hearing before the Eugenics Board,

> [t]he . . . [Board] may deny the prayer of the said petition or if in the judgment of the [Board], the case falls within the intent and meaning of one of more of the circumstances mentioned in 35-39, and an operation of asexualization or sterilization seems to said [Board] to be for the best interest of the mental, moral or physical improvement of the said . . . individual resident or for the public good, it shall be the duty of the [Board] to approve said recommendation in whole or in part[.]

N.C. Gen. Stat. § 35-46 (1973). All records related to cases that arose pursuant to the Act were required to be preserved permanently. N.C. Gen. Stat. § 35-53 (1973).

Because Claimant was *involuntarily* sterilized, the only legislation in effect at the time authorizing Claimant's sterilization was the Eugenics Act. As clearly stated by the Eugenics Act, "no operation described in this Section shall be lawful unless and until the provisions of this Article shall be first complied with." N.C. Gen. Stat. § 35-37 (1973). However, there is no evidence that the provisions of the Eugenics Act were complied with prior to the involuntary sterilization of Claimant. For example, the record contains no petition to the Eugenics Board by anyone requesting the involuntary sterilization of Claimant. There is no indication that any notice was given or hearing conducted, or that any order authorizing Claimant's sterilization was ever entered. *See* N.C. Gen. Stat. §§ 35-37, 35-39, 35-43, 35-44, 35-45, 35-46, 35-47 and 35-53 (1973). Though the Industrial Commission, implicitly at least, found that Claimant's involuntary sterilization was carried out at the instigation of DSS, because DSS failed to follow the then existing law in pursuing Claimant's involuntary sterilization, we are left to determine whether Claimant is entitled to compensation from the Compensation Program as "[a]n individual who was asexualized involuntarily or sterilized involuntarily under the authority of the Eugenics Board of North Carolina in accordance with Chapter 224 of the Public Laws of 1933 or Chapter 221 of the Public Laws of 1937." N.C. Gen. Stat. § 143B-426.50(5).

Although it is possible that members of the General Assembly were unaware at the time that N.C. Gen. Stat. § 143B-426.50(5) was enacted that many involuntary sterilizations had been conducted outside the parameters of the Eugenics Act – and thus had been conducted without legal authority – we are constrained to apply the plain meaning of N.C.

Gen. Stat. § 143B-426.50(5) unless we determine its language is ambiguous. We hold the language of N.C. Gen. Stat. § 143B-426.50(5) is clear and without ambiguity.

> Statutory interpretation properly begins with an examination of the plain words of the statute. The legislative purpose of a statute is first ascertained by examining the statute's plain language. "When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning."

Correll v. Division of Social Services, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992). We cannot make any holding contrary to the clear meaning of N.C. Gen. Stat. § 143B-426.50(5). We must consider the words of the statute as they appear. N.C. Gen. Stat. § 143B-426.50(5) sets forth two requirements that must be proven before a claimant may be considered a qualified recipient: (1) the claimant must have been involuntarily sterilized "under the authority of the Eugenics Board of North Carolina," and (2) the claimant must have been involuntarily sterilized in accordance with the procedures as set forth in "Chapter 224 of the Public Laws of 1933 or Chapter 221 of the Public Laws of 1937." N.C. Gen. Stat. § 143B-426.50(5). In the present case, unfortunately, Claimant cannot show that either of these requirements has been met.

There is no record evidence that the Eugenics Board was ever informed of Claimant's involuntary sterilization, nor that it was consulted in the matter in any way. Because the language of N.C. Gen. Stat. § 143B-426.50(5) is clear, "there is no room for judicial construction, and [this Court] must give it its plain and definite meaning." *Correll*, 332 N.C. at 144, 418 S.E.2d at 235. Further, all the evidence in this matter clearly demonstrates that Claimant's involuntary sterilization was performed without adherence to the requirements set forth in "Chapter 224 of the Public Laws of 1933 or Chapter 221 of the Public Laws of 1937." N.C. Gen. Stat. § 143B-426.50(5). Therefore, we must affirm.

AFFIRMED.

Judges DILLON and DAVIS concur.

IN RE HUGHES

[245 N.C. App. 398 (2016)]

IN THE MATTER OF HUGHES, BY AND THROUGH V.H. INGRAM, ADMINISTRATRIX OF THE ESTATE OF HUGHES, CLAIM FOR COMPENSATION UNDER THE NORTH CAROLINA EUGENICS ASEXUALIZATION AND STERILIZATION COMPENSATION PROGRAM, CLAIMANT-APPELLANT.

No. COA15-699

Filed 16 February 2016

IN THE MATTER OF REDMOND, BY AND THROUGH L. NICHOLS, ADMINISTRATRIX OF THE ESTATE OF REDMOND, CLAIM FOR COMPENSATION UNDER THE NORTH CAROLINA EUGENICS ASEXUALIZATION AND STERILIZATION COMPENSATION PROGRAM, CLAIMANT-APPELLANT.

No. COA15-763

Filed 16 February 2016

IN THE MATTER OF SMITH, CLAIM FOR COMPENSATION UNDER THE NORTH CAROLINA EUGENICS ASEXUALIZATION AND STERILIZATION COMPENSATION PROGRAM, CLAIMANT-APPELLANT.

No. COA15-829

Filed 16 February 2016

Appeal and Error—constitutional question from Industrial Commission—appellate jurisdiction

Constitutional claims in appeals to the Court of Appeals from the Industrial Commission involving compensation for eugenics sterilization were dismissed and remanded to the Industrial Commission for transfer to the Superior Court of Wake County and resolution by a three judge panel. There is no logical reason why a facial challenge to an act of the General Assembly would be reviewed differently depending on whether it was brought before the Industrial Commission or a court of the Judicial Branch.

Judge DILLON dissents by separate opinion.

Appeal by Claimant-Appellant Hughes, by and through V.H. Ingram, Administratrix of the Estate of Hughes, from amended decision and order entered 28 April 2015 by the North Carolina Industrial Commission. Appeal by Claimant-Appellant Redmond, by and through L. Nichols,

Administratrix of the Estate of Redmond, from decision and order entered 27 April 2015 by the North Carolina Industrial Commission. Appeal by Claimant-Appellant Smith from decision and order entered 7 May 2015 by the North Carolina Industrial Commission. Heard in the Court of Appeals 16 November 2015.

Pressly, Thomas & Conley, PA, by Edwin A. Pressly; and UNC Center for Civil Rights, by Elizabeth McLaughlin Haddix, for Claimant-Appellants.

Attorney General Roy Cooper, by Assistant Attorney General Marc X. Sneed, for North Carolina Department of Justice, Tort Claims Section.

McGEE, Chief Judge.

Ms. Hughes ("Hughes"), Ms. Redmond ("Redmond"), and Mr. Smith ("Smith")[1] were all "sterilized involuntarily under the authority of the Eugenics Board of North Carolina in accordance with Chapter 224 of the Public Laws of 1933 or Chapter 221 of the Public Laws of 1937." N.C. Gen. Stat. § 143B-426.50(5) (2013). Hughes died in 1996, Redmond died in 2010, and Smith died in 2006.

In 2013, the General Assembly enacted the Eugenics Asexualization and Sterilization Compensation Program ("the Compensation Program"), N.C. Gen. Stat. § 143B-426.50 *et seq.*, in order to provide compensation to victims of the North Carolina Eugenics laws. Because the North Carolina Industrial Commission ("Industrial Commission") concluded that Hughes, Redmond and Smith were "asexualized involuntarily or sterilized involuntarily under the authority of the Eugenics Board of North Carolina in accordance with Chapter 224 of the Public Laws of 1933 or Chapter 221 of the Public Laws of 1937[,]" they were "qualified recipients" under the Compensation Program. N.C. Gen. Stat. § 143B-426.50(5) (2013). However, N.C. Gen. Stat. § 143B-426.50(1) limited which qualified recipients could become successful claimants as follows: "Claimant. – An individual on whose behalf a claim is made for compensation as a qualified recipient under this Part. An individual *must be alive on June 30, 2013*, in order to be a claimant." N.C. Gen. Stat. § 143B-426.50(1) (emphasis added).

1. We avoid using the full names of Claimants in order to protect their anonymity.

The estates of Hughes, Redmond, and Smith ("Claimants") filed claims pursuant to the Compensation Program. However, because Hughes, Redmond and Smith each died before 30 June 2013, those claims were denied. Each Claimant followed the appeals process from the initial denial of their claims to the rehearings by deputy commissioners. Following denials by the deputy commissioners, Claimants filed appeals to the Full Commission. N.C. Gen. Stat. § 143B-426.53 (2013). Following denial of their claims by the Full Commission, Claimants filed notices of appeal with this Court. *Id.* On appeal, Claimants argue that N.C. Gen. Stat. § 143B-426.50(1), by limiting recovery to victims or heirs of victims living on or after 30 June 2013, violates the North Carolina and the United States Constitutions.

Because we conclude this Court is without jurisdiction to consider Claimants' appeals, we must dismiss and remand to the Industrial Commission for transfer to Superior Court, Wake County.

According to the Compensation Program: "The [Industrial] Commission shall determine whether a claimant is eligible for compensation as a qualified recipient under this Part. The Commission shall have all powers and authority granted under Article 31 of Chapter 143 of the General Statutes with regard to claims filed pursuant to this Part." N.C. Gen. Stat. § 143B-426.53(a) (2013). Article 31 of Chapter 143 of the General Statutes constitutes the Tort Claims Act. According to the Tort Claims Act: "The North Carolina Industrial Commission is hereby constituted a court for the purpose of hearing and passing upon tort claims against the State Board of Education, the Board of Transportation, and all other departments, institutions and agencies of the State." N.C. Gen. Stat. § 143-291(a) (2013). Therefore, the Industrial Commission acts as a court when determining whether claimants under the Compensation Program meet the criteria for compensation.

Claimants argue that N.C. Gen. Stat. § 143B-426.50(1)

> violates the guarantees to equal protection and due process under Article 1, Section 19 of the Constitution of the State of North Carolina and the Fourteenth Amendment to the Constitution of the United States because there is no rational basis to deny compensation to an otherwise qualified claimant who dies before June 20, 2013 while granting compensation to the heirs of a qualified claimant who dies after June 30, 2013.

The General Assembly, by statute enacted in 2014, created a new procedure and venue for facial constitutional challenges of its enactments. N.C. Gen. Stat. § 1-267.1 states in relevant part:

> [A]ny facial challenge to the validity of an act of the General Assembly *shall* be transferred pursuant to G.S. 1A-1, Rule 42(b)(4), to the Superior Court of Wake County and *shall* be heard and determined by a three-judge panel of the Superior Court of Wake County, organized as provided by subsection (b2) of this section.

N.C. Gen. Stat. § 1-267.1(a1) (2014) (emphasis added). The General Assembly had the authority to limit jurisdiction in this manner.[2] N.C. Gen. Stat. § 1-267.1 further states in relevant part:

> No order or judgment shall be entered . . . [that] finds that an act of the General Assembly is facially invalid on the basis that the act violates the North Carolina Constitution or federal law, except by a three-judge panel of the Superior Court of Wake County organized as provided by subsection (b) or subsection (b2) of this section.

N.C. Gen. Stat. § 1-267.1 (c); *see also* N.C. Gen. Stat. § 1-81.1 (a1) (2014) ("Venue lies exclusively with the Wake County Superior Court with regard to any claim seeking an order or judgment of a court, either final or interlocutory, to restrain the enforcement, operation, or execution of an act of the General Assembly, in whole or in part, based upon an allegation that the act of the General Assembly is facially invalid on the basis that the act violates the North Carolina Constitution or federal law. Pursuant to G.S. 1–267.1(a1) and G.S. 1–1A, Rule 42(b)(4), *claims described in this subsection that are filed or raised in courts other than Wake County Superior Court* or that are filed in Wake County Superior Court *shall be transferred to a three-judge panel* of the Wake County Superior Court if, after all other questions of law in the action have been resolved, a determination as to the facial validity of an act of the General Assembly must be made in order to completely resolve any issues in the case.") (emphasis added).

These provisions became law, and thus effective, on 7 August 2014. 2014 N.C. Sess. Laws, ch. 100, § 18B.16(f) ("The remainder of this section is effective when it becomes law and applies to any claim filed on or

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2. "Except as otherwise provided by the General Assembly, the Superior Court shall have original general jurisdiction throughout the State." N.C. Const. art. IV, § 12(3). "The General Assembly may make rules of procedure and practice for the Superior Court and District Court Divisions[.]" N.C. Const. art. IV, § 13(2). The General Assembly also has the authority to prescribe the appellate jurisdiction of this Court. N.C. Const. art. IV, § 12(2) ("The Court of Appeals shall have such appellate jurisdiction as the General Assembly may prescribe.").

after that date or asserted in an amended pleading on or after that date that asserts that an act of the General Assembly is either facially invalid or invalid as applied to a set of factual circumstances on the basis that the act violates the North Carolina Constitution or federal law."). N.C. Gen. Stat. § 1A-1, Rule 42(b)(4) states:

> Pursuant to G.S. 1-267.1, any facial challenge to the validity of an act of the General Assembly, other than a challenge to plans apportioning or redistricting State legislative or congressional districts, shall be heard by a three-judge panel in the Superior Court of Wake County if a claimant raises such a challenge in the claimant's complaint *or amended complaint in any court in this State*, or if such a challenge is raised by the defendant in the defendant's answer, responsive pleading, or within 30 days of filing the defendant's answer or responsive pleading. In that event, the court *shall*, *on its own motion*, transfer that portion of the action challenging the validity of the act of the General Assembly to the Superior Court of Wake County for resolution by a three-judge panel if, after all other matters in the action have been resolved, a determination as to the facial validity of an act of the General Assembly must be made in order to completely resolve any matters in the case. The court in which the action originated shall maintain jurisdiction over all matters other than the challenge to the act's facial validity and shall stay all matters that are contingent upon the outcome of the challenge to the act's facial validity pending a ruling on that challenge and until all appeal rights are exhausted. Once the three-judge panel has ruled and all appeal rights have been exhausted, the matter shall be transferred or remanded to the three-judge panel or the trial court in which the action originated for resolution of any outstanding matters, as appropriate.

N.C. Gen. Stat. § 1A-1, Rule 42(b)(4) (2014) (emphasis added). Pursuant to N.C. Gen. Stat. § 143B-426.53(a), in the matters before us "[t]he Commission shall have all powers and authority granted under Article 31 of Chapter 143 of the General Statutes with regard to claims filed pursuant to this Part." Pursuant to Article 31 of Chapter 143:

> The Industrial Commission is hereby authorized and empowered to adopt such rules and regulations as may, in the discretion of the Commission, be necessary to carry out the purpose and intent of this Article. *The North*

> *Carolina Rules of Civil Procedure* and Rules of Evidence, insofar as they are not in conflict with the provisions of this Article, *shall be followed in proceedings under this Article.*

N.C. Gen. Stat. § 143-300 (2013) (emphasis added). We disagree with the dissenting opinion's conclusion that Rule 42(b)(4) does not apply in the matters before us.

The dissenting opinion contends that "it could be argued that G.S. 1-267.1 only applies to actions and proceedings in the general court of justice. *See*, *e.g.*, N.C. Gen. Stat. § 1-1." We are in agreement that the Industrial Commission is not a part of the Judicial Branch. However, N.C. Gen. Stat. § 1-1 simply states: "Remedies in the courts of justice are divided into – (1) Actions[,] [and] (2) Special proceedings." N.C. Gen. Stat. § 1-1 (2013). We are not convinced that N.C. Gen. Stat. § 1-1, or any other provision in Chapter 1 serves to prevent the application of N.C. Gen. Stat. § 1-267.1 to the matters before us.

The dissenting opinion cites *Ocean Hill v. N.C. DEHNR* for the proposition that "the grant of limited judicial authority to an administrative agency does not transform the agency into a court for purposes of the statute of limitations." *Ocean Hill Joint Venture v. N.C. Dept of E.H.N.R.*, 333 N.C. 318, 321, 426 S.E.2d 274, 276 (1993); *see also In re Twin County Motorsports*, 367 N.C. 613, 766 S.E.2d 832 (2014). Our Supreme Court in *Ocean Hill* simply held that because the relevant statute of limitations provision, N.C. Gen. Stat. § 1-54(2) only applied to "actions" or "proceedings" in the general court of justice, and because an Executive Branch agency is not a part of the general court of justice, N.C. Gen. Stat. § 1-54(2) did not apply to matters decided by the Office of Administrative Hearings. This holding in *Ocean Hill* does not stand for the proposition that *no* provisions of Chapter 1 can ever apply to matters heard outside the general court of justice. In fact, this Court has applied provisions from Chapter 1 to matters heard by the Industrial Commission. *See Sellers v. FMC Corp.*, 216 N.C. App. 134, 139, 716 S.E.2d 661, 665 (2011), *disc. review denied*, 366 N.C. 250, 731 S.E.2d 429 (2012) (applying N.C. Gen. Stat. § 1–278); *Parsons v. Board of Education*, 4 N.C. App. 36, 42, 165 S.E.2d 776, 780 (1969) (applying N.C. Gen. Stat. § 1-139).

As there is nothing in N.C. Gen. Stat. § 1-267.1 limiting its application to actions or proceedings conducted in the general court of justice, and as there is no logical reason why a facial challenge to an act of the General Assembly would be reviewed differently depending on

whether it was brought before the Industrial Commission or a court of the Judicial Branch, we hold that N.C. Gen. Stat. § 1-267.1 applies to the matters before us. Because, pursuant to N.C. Gen. Stat. § 143B-426.53(a) and the Tort Claims Act, the Industrial Commission has been constituted as a court for resolution of the matters before us, N.C. Gen. Stat. § 1-267.1 and other relevant provisions apply, so long as the facial challenges in these matters were included in pleadings or amended pleadings filed on or after 7 August 2014.

We must also address the dissenting opinion's argument concerning this Court's appellate jurisdiction. N.C. Gen. Stat. § 7A-26 is a statute granting general appellate jurisdiction and cannot serve to broaden the jurisdiction of this Court if that jurisdiction has been curtailed or rescinded by another, more specific, statute. *See In re Vandiford*, 56 N.C. App. 224, 226-27, 287 S.E.2d 912, 913-14 (1982). *State v. Colson*, 274 N.C. 295, 302-03, 163 S.E.2d 376, 381 (1968), relied on by the dissenting opinion, has been abrogated by statute, specifically N.C. Gen. Stat. § 1-267.1 and N.C. Gen. Stat. § 1-1A, Rule 42(b)(4), so far as a facial challenge to an enactment of the General Assembly, such as the one before us, is concerned. N.C. Gen. Stat. § 143B-426.53(f), the statute granting a right of appeal from the denial of a claim pursuant to the Compensation Program, stated: "Appeals under this section shall be in accordance with the procedures set forth in G.S. 143-293[.]" N.C. Gen. Stat. § 143B-426.53(f) (2013). N.C. Gen. Stat. § 143-293, which concerns appeals from the Industrial Commission when acting as a court for the purposes of the Tort Claims Act, states: "appeal shall be for errors of law only under the same terms and conditions as govern appeals in ordinary civil actions[.]" N.C. Gen. Stat. § 143-293 (2013). N.C. Gen. Stat. § 7A-27 is the statute governing appeals of right in ordinary civil actions.[3] For this reason, N.C. Gen. Stat. § 7A-29(a), which applies generally to appeals from the Industrial Commission and other administrative agencies, does not apply to the present appeal.

We do not believe a general grant of jurisdiction to this Court to review decisions of the Industrial Commission, or more specifically in these instances – decisions denying compensation pursuant to the Compensation Program – can supplant the intent of the General Assembly that "any facial challenge to the validity of an act of the

3. We note that because, pursuant to N.C. Gen. Stat. § 143B-426.53(f) and N.C. Gen. Stat. § 143-293, N.C. Gen. Stat. § 7A-27 controls the appeal in this matter, the Industrial Commission must be included when N.C. Gen. Stat. § 7A-27 refers to "court," "trial court," "district court," or "superior court."

General Assembly shall be transferred pursuant to G.S. 1A-1, Rule 42(b)(4), to the Superior Court of Wake County and shall be heard and determined by a three-judge panel of the Superior Court of Wake County[.]" N.C. Gen. Stat. § 1-267.1(a1). The General Assembly, having provided an exclusive means of review of facial challenges to enactments of the General Assembly based upon the North Carolina Constitution or federal law, has thereby precluded review by other means in the first instance.[4]

Returning to the cases before us, Claimants initiated these actions by filing the necessary claims with the North Carolina Office of Justice for Sterilization Victims. These claims were initiated prior to 7 August 2014, and all three claims were first denied by the Industrial Commission based on the fact that Hughes, Redmond, and Smith had all died before 30 June 2013 and therefore did not qualify as claimants pursuant to N.C. Gen. Stat. § 143B-426.50(1) (2013) ("Claimant. – An individual on whose behalf a claim is made for compensation as a qualified recipient under this Part. An individual must be alive on June 30, 2013, in order to be a claimant.").

Each Claimant appealed the rejection of their claim according to the procedures set forth pursuant to the Compensation Program. However, because the Industrial Commission is not part of the judicial branch, it could not have made any determinations concerning a statute's constitutionality. *Carolinas Med. Ctr. v. Employers & Carriers Listed In Exhibit A*, 172 N.C. App. 549, 553, 616 S.E.2d 588, 591 (2005) (citations omitted) ("It is a 'well-settled rule that a statute's constitutionality shall be determined by the judiciary, not an administrative board.' "). For this reason, in their appeals from the decisions of the deputy commissioners, the attorneys representing the estates of Redmond and Smith included motions to certify the constitutional questions relevant to those appeals to this Court. The estate of Hughes, apparently operating without benefit of an attorney at the time, filed its appeal to the Full Commission without any motion to address the constitutional issues. The current attorney for the Hughes estate petitioned this Court for a writ of certiorari, which was granted 9 November 2015, in order to include the appeal of

4. The situation before us is analogous to the failure to follow the procedural mandates provided by the General Assembly for challenges to administrative decisions. *See Justice for Animals, Inc. v. Robeson Cty.*, 164 N.C. App. 366, 369, 595 S.E.2d 773, 775 (2004) (citations omitted) ("It is well-established that 'where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts.' If a plaintiff has failed to exhaust its administrative remedies, the court lacks subject matter jurisdiction and the action must be dismissed."); *See also Shell Island Homeowners Ass'n, Inc. v. Tomlinson*, 134 N.C. App. 217, 220-21, 517 S.E.2d 406, 410 (1999).

the Hughes estate along with those of the Redmond and Smith estates for consideration of their constitutional challenges.

We hold that the motions in COA15-763 and COA15-829 to certify constitutional questions to this Court and the petition for writ of certiorari in COA15-699, all of which were sought and granted following the 7 August 2014 effective date of N.C. Gen. Stat. § 1-267.1(a1), constituted claims

> asserted in an amended pleading on or after [7 August 2014] that assert[ed] that an act of the General Assembly [N.C. Gen. Stat. § 143B-426.50(1)] is either facially invalid or invalid as applied to a set of factual circumstances on the basis that the act violates the North Carolina Constitution or federal law.

2014 N.C. Sess. Laws, ch.100, § 18B.16(f). For this reason, the appropriate procedure is for the Industrial Commission, *sua sponte* if necessary, to "transfer that portion of the action challenging the validity of the act of the General Assembly to the Superior Court of Wake County for resolution by a three-judge panel[.]" N.C. Gen. Stat. § 1A-1, Rule 42(b)(4).

We dismiss Claimants' appeals, and remand to the Industrial Commission for transfer to the Superior Court of Wake County those portions of the actions challenging the constitutional validity of N.C. Gen. Stat. § 143B-426.50(1) for resolution by a three-judge panel pursuant to N.C. Gen. Stat. 1A-1, Rule 42(b)(4). The Industrial Commission may take any additional action, in accordance with the law, that it deems prudent or necessary to facilitate transfer.

DISMISSED AND REMANDED.

Judge DAVIS concurs.

Judge DILLON dissents by separate opinion.

DILLON, Judge, dissenting.

The majority concludes that N.C. Gen. Stat. § 1-267.1 (in which our General Assembly created "the three-judge panel" to consider facial constitutional challenges) abrogates our Court's appellate jurisdiction to consider the facial constitutional arguments raised in the present appeals. I believe, however, that we do have the *appellate jurisdiction*

to consider the facial challenge arguments raised by these appellants. Therefore, I respectfully dissent.

The North Carolina Constitution provides that "[t]he Court of Appeals shall have such appellate jurisdiction as the General Assembly may prescribe." N.C. Const. Art. IV, § 12(2).

The General Assembly has empowered the Court of Appeals with "jurisdiction to review upon appeal decisions . . . of administrative agencies, *upon matters of law or legal inference*, in accordance with the system of appeals provided in this Article [5]." N.C. Gen. Stat. § 7A-26 (2014) (emphasis added). Clearly, a facial challenge to a law is a matter of law or legal inference. *See State v. Colson*, 274 N.C. 295, 302-03, 163 S.E.2d 376, 381 (1968) (stating that "cases involving a substantial constitutional question are appealable *in the first instance to the intermediate appellate court* and then to the highest court as a matter of right") (emphasis added).

The General Assembly has provided in Article 5 that an "appeal of right lies directly to the Court of Appeals" "[f]rom *any* final order or decision of . . . the North Carolina Industrial Commission[.]" N.C. Gen. Stat. § 7A-29(a) (2014) (emphasis added).

Additionally, the General Assembly provided in the Compensation Program legislation that an unsuccessful claimant may appeal the Industrial Commission's denial of a claim to the Court of Appeals. N.C. Gen. Stat. § 143B-426.53(f) (2014).

The General Assembly has placed a limitation in Article 5 on our Court's consideration of facial challenges. Specifically, Article 5 provides that a litigant no longer has an "appeal of right" to the Court of Appeals *in the limited context* where the trial division has held "that an act of the General Assembly is facially invalid [based on our State Constitution or federal law]," but rather a litigant's appeal *in this limited context* "lies of right directly to the Supreme Court[.]" N.C. Gen. Stat. § 7A-27(a1) (2014).[1]

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1. The General Assembly has not expressly provided in N.C. Gen. Stat. § 7A-27(a1) that the Supreme Court has *exclusive appellate jurisdiction* to consider the appeal from an order in the trial division declaring a law to be facially invalid, only that the appeal of right lies with the Supreme Court and not with this Court. It may be argued that, in this context, our Court *could* exercise appellate jurisdiction through the power to grant *certiorari* conferred on us in Article 5 (assuming the parties seek review here and choose not to exercise their appeal of right to the Supreme Court). However, this argument need not be addressed here since there has been no determination in the trial division that the Compensation Program is facially invalid.

N.C. Gen. Stat. § 7A-27(a1), however, is not implicated in these appeals since there has not been any order holding that the Compensation Program is facially invalid. Indeed, the Industrial Commission is without authority even to consider the challenge. *See Meads v. N.C. Dep't. of Agric.*, 349 N.C. 656, 670, 509 S.E.2d 165, 174 (1998) (stating the "*well-settled rule* that a statute's constitutionality shall be determined by the judiciary, not an administrative board"); *Carolina Med. Ctr. v. Employers & Carriers*, 172 N.C. App. 549, 553, 616 S.E.2d 588, 591 (2005) (holding that Industrial Commission lacks power to consider constitutional issues).

Simply stated, these appeals are properly before us: They are from final determinations of the Industrial Commission involving claims made under the Compensation Program. N.C. Gen. Stat. § 143B-426.53(f) (2014). As such, we have the *appellate jurisdiction* to consider any "matters of law" raised by these claimants concerning the denial of their claims, including the matter concerning their facial challenge to the Compensation Program. N.C. Gen. Stat. §§ 1-267.1 and 7A-27(a1) do not provide any impediment since the appeal is not from a determination by the trial division that the Compensation Program is facially invalid.

It is true that "[o]rdinarily, appellate courts will not pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the trial court."[2] *State v. Hudson*, 281 N.C. 100, 105, 187 S.E.2d 756, 760 (1972). This Court, nonetheless, has been granted the authority to consider the arguments raised by these claimants. For instance, the General Assembly has provided the Court of Appeals with the power "to issue . . . writs . . in the aid of its jurisdiction, or to supervise and control the proceedings of . . . the Industrial Commission." N.C. Gen. Stat. § 7A-32(c) (2014). Our Supreme Court has recently recognized our Court's broad authority to issue such writs. *State v. Stubbs*, 368 N.C. 40, 42-44, 770 S.E.2d 74, 75-76 (2015). Further, in promulgating Rule 2 of our Rules of Appellate Procedure, our Supreme Court has recognized "the residual power of *our appellate courts* to consider, in exceptional circumstances, significant issues of importance in the public interest[.]" *Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d 298, 299 (1999) (emphasis added); *see also Dogwood Dev. and Mgmt. Co., LLC v. White Oak Transp. Co., Inc.*, 362 N.C. 191, 196, 657

2. The matter involves three appeals making a facial challenge to the Compensation Program. In two of the appeals (*In the Matter of Redmon* and *In the Matter of Smith*), the parties expressly raised the facial challenge before the Industrial Commission, though recognizing that the Commission lacked authority to act on it. Nonetheless, these claimants sought to preserve the issue for appeal. In the third appeal (*In re Hughes*), the claimant did not make a facial challenge at the Commission level.

S.E.2d 361, 364 (2008) ("Rule 2 permits *the appellate courts* to excuse a party's [failure to argue an issue at the trial level] in both civil and criminal appeals when necessary to . . . 'expedite decision in the public interest' ") (emphasis added).[3]

In conclusion, the General Assembly has addressed a past injustice suffered by many at the hands of the State. I believe that we have the appellate jurisdiction to consider the facial challenge to the Compensation Program. And to the extent that these claimants, or any of them, have lost their right of review of their constitutional arguments, I believe we should, nonetheless, exercise our authority to consider them. Otherwise, they could be deemed waived on remand.

Though not essential my conclusion above, I note that it could be argued that the N.C. Gen. Stat. §§ 1-267.1 and 1A-1, Rule 42(b)(4) do not apply to Compensation Program claims at all. Specifically, it could be argued that N.C. Gen. Stat. § 1-267.1 only applies to actions and proceedings in the general court of justice. *See*, *e.g.*, N.C. Gen. Stat. § 1-1 (2014) ("Remedies in the courts of justice are divided into . . . (1) Actions[] [and] (2) Special proceedings."). Our Supreme Court has so held in the context of the statute of limitations provisions in Chapter 1. *See In re Twin County Motorsports*, 367 N.C. 613, 616, 766 S.E.2d 832, 834-35 (2014) (holding that even though an administrative agency may be clothed with some measure of judicial authority, said agency is not

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3. The majority suggests that the context here is analogous to the context where a party has not exhausted its administrative remedies, in which case, courts lack subject-matter jurisdiction. The majority quotes *Justice for Animals, Inc. v. Robeson Cty.*, 164 N.C. App. 366, 369, 595 S.E.2d 773, 775 (2004), for the proposition that "where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts." I do not believe, however, that the situations are analogous.

In *Justice for Animals*, our Court was quoting the Supreme Court in *Presnell v. Pell*, 298 N.C. 715, 260 S.E.2d 611 (1979). In *Presnell*, the Supreme Court explained that exhaustion of administrative remedies was an essential prerequisite to a court's jurisdiction where the relevant administrative agency was "particularly qualified for the purpose [of reviewing the issue]," and "the legislature [by providing an administrative remedy] has expressed an intention to give the administrative entity most concerned with a particular matter the first chance to discover and rectify error." *Id.* at 721, 260 S.E.2d at 615. Here, though, the three-judge panel is no more "particularly qualified" than a panel of Court of Appeals judges to consider a facial challenge. I believe that the present situation is more analogous to any other situation where the trial division fails to rule on a legal issue (in which the appellate division has *de novo* review). In such a case, our Court is not required to remand the issue to the trial division, but may consider the issue on appeal, though generally we would deem the issue waived and refuse to consider it.

part a "court of justice" and, therefore, the statute of limitations provisions in Chapter 1 of our General Statutes do not apply). *See also Ocean Hill Joint Venture v. N.C. Dep't of Env't, Healh and Natural Res.*, 333 N.C. 318, 321, 426 S.E.2d 274, 276 (1993) (reversing a Court of Appeals determination that a matter before DEHNR was an action or proceeding within N.C. Gen. Stat. § 1-54). Also, the provisions of Subsection 8 ("Judgment") of Chapter 1 – of which N.C. Gen. Stat. § 1-267.1 is a part – only reference the general court of justice, and not administrative agencies. *See*, *e.g.*, N.C. Gen. Stat. § 1-208.1 (2014) (providing for the docketing of judgments rendered in the trial division, whereas N.C. Gen. Stat. § 97-87 provides for the docketing of awards of the Industrial Commission); *id.* § 1-277 (providing for appeals from the "superior or district court," whereas appeals from the Industrial Commission are provided for in other statutes).

Additionally, it could be argued that the procedure in Rule 42(b)(4) (containing the procedure for transfers to the three-judge panel) does not apply in the present appeals. Specifically, the Rules of Civil Procedure expressly provide that *the only* Industrial Commission matters which they govern are those tort claims brought under the Tort Claims Act. N.C. Gen. Stat. § 1A-1, Rule 1 (2014) ("These rules shall govern the procedure in the superior and district courts . . . [in civil] actions and proceedings [and] . . . the procedure in tort actions brought before the Industrial Commission"). *See Hogan v. Cone Mills*, 315 N.C. 127, 137, 337 S.E.2d 477, 483 (1985) (holding that the Rules do not apply directly to claims brought under the Worker's Compensation Act).[4] Compensation Program claims are not tort claims against the State.

But assuming N.C. Gen. Stat. § 1-267.1 does apply, generally, to Compensation Program proceedings, its procedure requiring transfer to a three-judge panel was never implicated in the *Hughes* appeal before this Court, as the claimant in that matter never made any facial challenge argument below. *See* N.C. Gen. Stat. § 1A-1, Rule 42(b)(4) (2014) (providing a procedure for trial courts to transfer facial challenges to a three-judge panel *only if* a challenge is actually made). Regarding the other two appeals before us, I note that those claimants *did* attempt to make the facial challenge below. However, the provision in N.C. Gen. Stat. § 1-267.1 allowing an appeal of right to the Supreme Court was

4. Though *Hogan* was subsequently reversed on other grounds by the Supreme Court, see 326 N.C. 476, 390 S.E.2d 136 (1990), its holding that the Rules of Civil Procedure do not apply to Worker's Compensation proceedings was not reversed, *see Moore v. City of Raleigh*, 135 N.C. App. 332, 336, 520 S.E.2d 133, 137 (1999).

never implicated since the Compensation Program was not held to be facially invalid.

In sum, N.C. Gen. Stat. § 1-267.1 and Rule 42 do not require that a three-judge panel decide *every* facial challenge raised in the trial division. For example, Rule 42 states that a three-judge panel need not decide a facial challenge when the decision is not necessary to the resolution of the case. However, the failure of having a three-judge panel decide the facial challenge issue does not abrogate our Court's appellate jurisdiction to consider the issue in an appeal that is otherwise properly before us. By way of example, suppose a defendant raises two defenses at the trial level, one of which is a facial challenge; and suppose, further, that a trial judge grants the defendant summary judgment based on the *other* defense. Our Appellate Rules allow the defendant to raise his facial challenge argument as an alternate basis in the law for his victory below, *see* N.C. R. App. P. 10(c) (allowing an appellee to propose issues on appeal as to an alternate basis in the law). In such a case, I do not believe that N.C. Gen. Stat. § 1-267.1 provides that a three-judge panel of our Court considering the appeal *be required* to remand the facial challenge issue to a three-judge panel of superior court judges before addressing the other issues. Rather, I believe that by enacting N.C. Gen. Stat. § 1-267.1 the General Assembly was simply providing a procedure whereby a facial challenge would never be left up to a single judge, but always to a panel of jurists.

PIRO v. McKEEVER

[245 N.C. App. 412 (2016)]

MICHAEL C. PIRO, PLAINTIFF
v.
REBECCA HADDEN McKEEVER, L.C.S.W.; CYNTHIA L. SAPP, PH.D.; KAREN BARRY, M.F.T., LMFT; AND DAVIDSON COUNSELING ASSOCIATES, DEFENDANTS.

No. COA15-351

Filed 16 February 2016

1. Emotional Distress—intentional—allegations—not sufficient

The trial court did not err by granting defendant-McKeever's Rule 12(b)(6) motion to dismiss a claim alleging intentional infliction of emotional distress arising from a domestic action, allegations of abuse, and McKeever's counseling of defendant's son. Plaintiff made conclusory allegations but failed to assert any facts depicting conduct by defendant McKeever that met the threshold of extreme and outrageous conduct and failed to assert any facts that would establish that defendant-McKeever knew or had a substantial certainty that plaintiff would suffer severe emotional distress as a result of McKeever's interview and counseling of his son, Noah.

2. Emotional Distress—intentional—counseling of plaintiff's son—foreseeability

The trial court did not erroneously usurp the function of the fact-finder in an action for intentional infliction of emotional distress arising from defendant-McKeever's counseling of defendant's son by concluding that the harm caused by defendant McKeever was unforeseeable. There were no allegations indicating that it was reasonably foreseeable that McKeever's conduct would cause plaintiff severe emotional distress or mental anguish.

Judge GEER concurs in result by separate opinion.

Judge TYSON dissents.

Appeal by plaintiff from order entered 3 November 2014 by Judge Robert C. Ervin in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 September 2015.

Horack Talley Pharr & Lowndes, P.A., by Christopher T. Hood and Gena Graham Morris, for plaintiff-appellant.

The Epstein Law Firm, PLLC, by Andrew J. Epstein, for defendant-appellee Rebecca Hadden McKeever, L.C.S.W.

BRYANT, Judge.

Where the allegations in the complaint, taken as true, fail to indicate that defendant's conduct was extreme and outrageous or that it was reasonably foreseeable plaintiff would suffer severe emotional distress, we affirm the trial court's dismissal of the complaint seeking relief for intentional infliction of emotional distress or negligent infliction of emotional distress.

On 24 February 2014, plaintiff Michael C. Piro filed a complaint in Mecklenburg County Superior Court seeking relief on the basis of negligent infliction of emotional distress, intentional infliction of emotional distress, and punitive damages. Plaintiff named as defendants Rebecca Hadden McKeever, L.C.S.W.; Cynthia L. Sapp, Ph.D.; Karen Barry, M.F.T., LMFT; and Davidson Counseling Associates. Defendant McKeever is a licensed clinical social worker, defendant Sapp a licensed clinical psychologist, and defendant Barry a licensed marriage and family therapist.

In his complaint, plaintiff asserts that plaintiff and Karen Shapiro Piro (Shapiro) are the parents of three boys: Allen (then 14 years of age);Noah (then 12 years of age); and Michael (then 4 years of age).[1] On 28 June 2006, plaintiff filed a complaint raising issues of child custody, child support, equitable distribution, and interim distribution. On 16 November 2007, a custody order was entered awarding plaintiff and Shapiro joint legal and physical custody of Allen and Noah.[2]

In April 2011, plaintiff's eldest child, Allen, began receiving services from defendant McKeever. Plaintiff alleges that the day after a 7 April 2011 meeting between defendant McKeever, Shapiro, and Shapiro's father, Shapiro contacted the Mecklenburg County Department of Social Services' Child Protective Services (DSS) and alleged that plaintiff had sexually assaulted Noah. DSS contacted the Huntersville Police Department (HPD), and both agencies conducted concurrent investigations into Shapiro's allegations. On 19 April 2011, HPD concluded that no probable cause existed to charge plaintiff. DSS likewise found the allegations against plaintiff to be unsubstantiated, and also closed its investigation.

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1. Pseudonyms are used to protect the identities of the minor children.

2. At that time, Michael had yet to be born.

In May 2011, defendant McKeever conducted her first and second therapy sessions with Noah. Thereafter, Shapiro again contacted DSS and reported additional allegations of sexual abuse upon Noah by plaintiff. DSS declined to reopen its investigation into Shapiro's allegations, but HPD commenced a second investigation.

On 9 June 2011, defendant McKeever conducted a forensic interview of Noah, and thereafter, Noah went to Pat's Place Child Advocacy Center, where a professional forensic interviewer sought specific details regarding sexual abuse perpetrated by plaintiff.

On 27 June 2011, the Honorable Christy T. Mann entered an order that granted Shapiro sole custody of the children, directed plaintiff to vacate the marital residence, and prohibited plaintiff from having any contact with Allen, Noah, and Michael. Judge Mann's order that plaintiff have no contact with Allen, Noah, and Michael remained in effect from June 2011 through November 2013.

In his complaint, plaintiff alleged that defendant McKeever's conduct and interview techniques were in contravention of the American Counseling Association Code of Ethics, and McKeever should have known that the use of such techniques substantially increased the risk of erroneous and unreliable results. Plaintiff alleges that defendant McKeever was an agent and/or servant of defendant Davidson Counseling Associates and that defendants Sapp and Barry directly participated in Noah's treatment by discussing, consulting, and supervising defendant McKeever's care of Noah. Plaintiff also asserts that "DSS, HPD, a court-appointed forensic custody evaluator, and[,] ultimately[,] the Judge presiding over the Domestic Action found the allegations of sexual abuse to be unsubstantiated," although nothing in the record before this Court supports such a finding by a judge. Plaintiff alleges that he has suffered severe emotional distress, including mental anguish, depression, stress, embarrassment, humiliation, concern for his sons, substantial monetary expenses, and other damages.

Defendants McKeever, Barry, and Sapp filed individual answers to plaintiff's complaint, including a motion to dismiss plaintiff's claims. Defendant Davidson Counseling Associates also filed a motion to dismiss. On 2 September, 28 October, and 3 November 2014, the Honorable Robert C. Ervin, Judge presiding in Mecklenburg County Superior Court, entered orders granting defendants' individual motions to dismiss plaintiff's complaint with prejudice, pursuant to Rule 12(b)(6). In pertinent part, the trial court concluded that plaintiff's complaint failed to allege the "extreme and outrageous conduct" necessary to recover for

intentional infliction of emotional distress and failed to establish that it was reasonably foreseeable defendant McKeever's conduct would cause plaintiff severe emotional distress as required to recover for a claim of negligent infliction of emotional distress. Plaintiff appeals only from the order granting defendant McKeever's motion to dismiss.

On appeal, plaintiff raises the following issues: whether the trial court erred by concluding (I) that defendant McKeever's alleged conduct did not meet the threshold for extreme and outrageous; and (II) that the harm caused by defendant McKeever was unforeseeable.

Standard of Review

> A pleading which sets forth a claim for relief, whether an original claim, counterclaim, crossclaim, or third-party claim shall contain . . . [a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief[.]

N.C. Gen. Stat. § 1A-1, Rule 8(a)(1) (2013). "Under the 'notice theory of pleading' a complainant must state a claim sufficient to enable the adverse party to understand the nature of the claim, to answer, and to prepare for trial." *Ipock v. Gilmore*, 73 N.C. App. 182, 188, 326 S.E.2d 271, 276 (1985) (citation omitted) (citing N.C. Gen. Stat. § 1A-1, Rule 8(a)(1) (1983); *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970)). " 'While the concept of notice pleading is liberal in nature, a complaint must nonetheless state enough to give the substantive elements of a legally recognized claim or it may be dismissed under Rule 12(b)(6).' " *Highland Paving Co., LLC v. First Bank*, ___ N.C. App. ___, ___, 742 S.E.2d 287, 293 (2013) (quoting *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 205, 367 S.E.2d 609, 612 (1988)).

> Our review of the grant of a motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure is *de novo*. We consider whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory.

Bridges v. Parrish, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013) (citation and quotations omitted). " '[A] complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support

of the claim.' " *Acosta v. Bynum*, 180 N.C. App. 562, 567, 638 S.E.2d 246, 250 (2006) (quoting *Sutton*, 277 N.C. at 103, 176 S.E.2d at 166).

I

[1] Plaintiff argues that the trial court erred in dismissing his claim for intentional infliction of emotional distress. Plaintiff argues his complaint establishes conduct on the part of defendant McKeever that a jury could find extreme and outrageous. Specifically, plaintiff contends that defendant McKeever's conduct resulted in accusations that plaintiff sexually assaulted Noah and deprived plaintiff of companionship with his minor children for three years. We disagree.

The tort of intentional infliction of emotional distress was formally recognized by our Supreme Court in *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979), as noted in *Dickens v. Puryear*, 302 N.C. 437, 446–47, 276 S.E.2d 325, 331 (1981).

> This tort imports an act which is done with the intention of causing emotional distress or with reckless indifference to the likelihood that emotional distress may result. A defendant is liable for this tort when he desires to inflict severe emotional distress or knows that such distress is certain, or substantially certain, to result from his conduct or where he acts recklessly in deliberate disregard of a high degree of probability that the emotional distress will follow and the mental distress does in fact result.

Dickens, 302 N.C. at 449, 276 S.E.2d at 333 (citations, quotations, and ellipsis omitted). "This tort . . . consists of: (1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress to another." *Id.* at 452, 276 S.E.2d at 335.

> [Our Supreme Court has also] stated that the severe emotional distress required for [intentional infliction of emotional distress] is the same as that required for negligent infliction of emotional distress, which is:
>
> > any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so.

Holloway v. Wachovia Bank & Trust Co., 339 N.C. 338, 354–355, 452 S.E.2d 233, 243 (1994) (citing *Johnson v. Ruark Obstetrics & Gynecology*

Assoc., 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990)). "Conduct is extreme and outrageous when it exceeds all bounds usually tolerated by a decent society." *Shreve v. Duke Power Co.*, 85 N.C. App. 253, 257, 354 S.E.2d 357, 359 (1987) (citation and quotations omitted).

In his complaint, plaintiff made the following assertions:

> 9. Defendant McKeever is a Licensed Clinical Social Worker. Upon information and belief, Defendant McKeever was at all relevant times licensed to render services in the State of North Carolina under license/certification number C003301.
>
> . . .
>
> 16. Plaintiff's oldest son, [Allen], and middle son, [Noah] received services from Defendant McKeever from approximately April, 2011 through September 2013.
>
> 17. During Defendant McKeever's treatment of [Allen] and [Noah], Defendant McKeever discussed, consulted with, and sought supervision from Defendant Sapp[, a licensed Clinical Psychologist,] and Defendant Barry[, a licensed Marriage and Family Therapist,] regarding [Defendant McKeever's] treatment of, at a minimum, [Noah].
>
> . . .
>
> 27. On or about May 19, 2011, Defendant McKeever met [Noah] for the first time. Defendant McKeever had a therapy session with [Noah] that day.
>
> 28. On or about May 26, 2011, Defendant McKeever conducted a therapy session with [Noah].
>
> . . .
>
> 32. On June 9, 2011, Defendant McKeever conducted a therapy session with [Noah].
>
> 33. Prior to June 9, 2011, [Noah] never reported to defendant McKeever that he had been the victim of any sexual abuse perpetrated by Plaintiff.
>
> 34. At that June 9, 2011 therapy session, Defendant McKeever engaged in and conducted an interview of [Noah]. Defendant McKeever conducted that

interview in the form of a forensic interview aimed at eliciting from [Noah] a report of sexual abuse.

35. Defendant McKeever knew or should have known that she should not have conducted that June 9, 2011 forensic interview.

. . .

42. Defendant McKeever's conduct and interview of [Noah] inappropriately used overly suggestive questioning, made over-interpretations, and otherwise employed means and methods known or that should have been known to produce inaccurate and unreliable results. Further, the conduct and interview engaged in by Defendant McKeever specifically targeted Plaintiff and/or was overly suggestive of improper behavior by Plaintiff. Defendants' subsequent conduct exacerbated the situation.

. . .

46. Defendant McKeever had knowledge of the risks attendant to her conduct, including the risks that DSS and HPD would investigate and prohibit and/or limit Plaintiff's visitation, that Karen Shapiro would seek to limit and/or prohibit custody and visitation by Plaintiff, that the relationship between Plaintiff and the Boys would be adversely affected, that Plaintiff would sustain separation from the Boys, and that Plaintiff would suffer severe emotional distress and other damages.

. . .

53. Since and as a result of Defendants' conduct, Plaintiff has suffered severe emotional distress.

. . .

58. As a direct and proximate result of the acts and omissions of Defendants, Plaintiff has suffered and will continue to suffer severe emotional distress, including but not limited to mental anguish, depression, stress, embarrassment, humiliation, concern for his sons, substantial monetary expenses, and other damages to be proven at trial.

Plaintiff makes conclusory allegations but fails to assert any facts depicting conduct by defendant McKeever that meet the threshold of extreme and outrageous conduct, that is, conduct "exceed[ing] all bounds usually tolerated by a decent society." *Shreve*, 85 N.C. App. at 257, 354 S.E.2d at 359. Moreover, plaintiff fails to assert any facts that would establish defendant McKeever knew or had a substantial certainty plaintiff would suffer severe emotional distress as a result of McKeever's interview and counseling of Noah. *See Holloway*, 339 N.C. at 354–55, 452 S.E.2d at 243 (defining severe emotional distress as "any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so"). Plaintiff's complaint essentially asks the court to speculate on what action exhibited by defendant was extreme and outrageous: performing her job as a licensed clinical social worker?; or meeting with children's parent or grandparents? We note defendant does not allege any type of breach of confidentiality. Unwittingly or not, plaintiff's complaint causes one to speculate that the allegations of sexual abuse upon his children was a major concern to the trial court and led to the two year no contact order against plaintiff. From this, one could further infer that plaintiff's own actions, not those of defendant McKeever, provided the impetus for what plaintiff claims as the denial of "substantive and meaningful contact with the Boys."[3] Thus, as plaintiff failed to allege facts to show that defendant's conduct amounted to extreme and outrageous behavior, it was proper for the trial court to dismiss plaintiff's claim of intentional infliction of emotional distress. Further, plaintiff has not shown that he suffered from severe emotional distress (neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition).

For the aforementioned reasons, we overrule plaintiff's argument.

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3. It is noted that both the dissent and the concurring opinion react to the above comments in this majority opinion that are essentially dicta, as they are speculative and not necessary to a proper *de novo* review of the complaint. The majority opinion does reason, separate and apart from the dicta, that the "facts" in the complaint, as alleged by plaintiff, when taken in the light most favorable to plaintiff, fail to support plaintiff's claim for intentional infliction of emotional distress. The dicta merely reveals how plaintiff's complaint not only fails to allege facts to establish his claim, but alleges facts that support an inference as to why relief cannot be granted.

II

[2] Next, plaintiff argues that the trial court erroneously usurped the function of the fact-finder by concluding the harm caused by defendant McKeever was unforeseeable. Alternatively, plaintiff argues that the complaint establishes foreseeable harm sufficient to state a claim for negligent infliction of emotional distress. We disagree.

> Our cases have established that to state a claim for negligent infliction of emotional distress, a plaintiff must allege that (1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress (often referred to as "mental anguish"), and (3) the conduct did in fact cause the plaintiff severe emotional distress. Although an allegation of ordinary negligence will suffice, a plaintiff must also allege that severe emotional distress was the foreseeable and proximate result of such negligence in order to state a claim[.]

Ruark Obstetrics, 327 N.C. at 304, 395 S.E.2d at 97 (citations omitted).

On appeal, plaintiff contends that his complaint makes numerous allegations that, when treated as true, establish defendant McKeever had a duty to refrain from negligently interacting with Noah and Ms. Shapiro. Defendant appears to argue, albeit indirectly, that his allegations show that it was foreseeable to defendant McKeever that plaintiff would be subject "to multiple investigations by the authorities [that] would unreasonably interfere with, and suspend for nearly three years, Plaintiff[]'s relationship with his children." We disagree.

There are no allegations in plaintiff's complaint which indicate that it was reasonably foreseeable that McKeever's conduct—i.e. her interview and counseling of plaintiff's child—would cause *plaintiff* severe emotional distress or mental anguish. *See Holloway*, 339 N.C. at 354–355, 452 S.E.2d at 243 (defining "severe emotional distress" as "any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so"). Accordingly, we overrule plaintiff's argument.

AFFIRMED.

Judge GEER concurs in result by separate opinion.

Judge TYSON dissents.

GEER, Judge, concurring in the result.

I agree with the majority opinion that the trial court properly granted defendant McKeever's motion to dismiss, but I reach this conclusion based on somewhat different reasoning. I, therefore, respectfully concur in the result.

With regard to plaintiff's claim for intentional infliction of emotional distress ("IIED"), the majority opinion holds that plaintiff has failed to state a claim upon which relief can be granted because "Plaintiff [made] conclusory allegations but fail[ed] to assert any facts depicting conduct by defendant McKeever that meet the threshold of extreme and outrageous conduct[.]" While I agree with this conclusion, I agree with the dissent that the following reasoning from the majority opinion is inconsistent with the standard applicable to a motion to dismiss:

> Plaintiff's complaint essentially asks the court to speculate on what action exhibited by defendant was extreme and outrageous: performing her job as a licensed clinical social worker?; or meeting with children's parent or grandparents? We note defendant does not allege any type of breach of confidentiality. Unwittingly or not, plaintiff's complaint causes one to speculate that the allegations of sexual abuse upon his children was a major concern to the trial court and led to the two year no contact order against plaintiff. From this, one could further infer that plaintiff's own actions, not those of defendant McKeever, provided the impetus for what plaintiff claims as the denial of "substantive and meaningful contact with the Boys."

In deciding a motion to dismiss, the factual allegations must be read in the light most favorable to the plaintiff. The majority opinion, however, draws an inference in favor of defendant McKeever.

I do not believe that drawing this inference is necessary given that the allegations in the complaint are not sufficient standing alone to rise to the level of IIED. "[T]he initial determination of whether conduct is extreme and outrageous is a question of law for the court: '*If the court determines that it may reasonably be so regarded*, then it is for the jury to decide whether, under the facts of a particular case, defendants' conduct . . . was in fact extreme and outrageous.' " *Johnson v. Bollinger*, 86 N.C. App. 1, 6, 356 S.E.2d 378, 381-82 (1987) (quoting *Briggs v. Rosenthal*,

73 N.C. App. 672, 676, 327 S.E.2d 308, 311 (1985)). " 'Conduct is extreme and outrageous when it is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.' " *Johnson v. Colonial Life & Accident Ins. Co.*, 173 N.C. App. 365, 373, 618 S.E.2d 867, 872 (2005) (quoting *Guthrie v. Conroy*, 152 N.C. App. 15, 22, 567 S.E.2d 403, 408-09 (2002)). "[T]his Court has set a high threshold for a finding that conduct meets the standard." *Dobson v. Harris*, 134 N.C. App. 573, 578, 521 S.E.2d 710, 715 (1999), *rev'd on other grounds*, 352 N.C. 77, 530 S.E.2d 829 (2000).

In deciding whether the conduct alleged here was extreme and outrageous, it is necessary to parse through our existing case law to determine exactly what kind of conduct alleged is sufficiently "atrocious" or "intolerable in a civilized community" in order to withstand a motion to dismiss for failure to state a claim for relief. *Johnson*, 173 N.C. App. at 373, 618 S.E.2d at 872. In *West v. King's Dep't Store, Inc.*, 321 N.C. 698, 705-06, 365 S.E.2d 621, 625-26 (1988), our Supreme Court found that the behavior of a store manager in publicly accusing two patrons of shoplifting and threatening legal action against them, even after they presented their receipt for purchase, was sufficient to withstand a motion for a directed verdict dismissing their claims for IIED. Likewise, in *Turner v. Thomas*, ___ N.C. App. ___, ___, 762 S.E.2d 252, 264 (2014), *disc. review allowed*, 367 N.C. 810, 767 S.E.2d 523 (2015), this Court found a plaintiff's complaint sufficiently pled a claim for IIED when the complaint alleged that "defendants . . . -- public officers -- essentially manufactured evidence to negate plaintiff's self defense claim" in plaintiff's "highly publicized" prosecution for a murder of which he was later exonerated.

In *Turner*, we juxtaposed the facts of that case with the facts in *Dobson*, where a department store employee exaggerated a report of child abuse against a store customer and reported it to the Department of Social Services. *Dobson*, 134 N.C. App. at 575, 521 S.E.2d at 713. We found that "[i]n *Dobson*, the defendant was a private citizen whose false accusations of criminal conduct merely served to initiate an investigatory process. The defendant's conduct in *Dobson* was not considered outrageous in part due to the existence of an independent investigatory process that served to protect the plaintiff from further proceedings based on false accusations." *Turner*, ___ N.C. App. at ___, 762 S.E.2d at 265.

I find the distinction between *Turner* and *Dobson* applicable here. Defendant McKeever was not a "public officer," as were the state agents

in *Turner*, but was a private citizen performing her work as a licensed clinical social worker, leaving further investigation of the child abuse allegations to the appropriate authorities. Furthermore, I would point out that plaintiff makes no allegations that defendant McKeever intentionally "manufactured evidence" against plaintiff and makes no allegations that defendant had knowledge of -- and ignored -- prior unsubstantiated allegations of child abuse against plaintiff. Thus, there is a common element in *Turner* and *West* that is not alleged against defendant McKeever here: the intentional and knowing disregard of facts that could potentially exonerate or call into question plaintiff's allegedly criminal conduct.

Therefore, I agree with the majority opinion that plaintiff has failed to sufficiently allege conduct rising to the level of IIED, but I reach that conclusion based on the similarity of this case to *Dobson* and the material distinctions between this case and *Turner* and *West*. I cannot agree with the dissenting opinion which states that "defendant McKeever used suggestive questioning and other techniques specifically aimed at eliciting a false allegation of sexual abuse . . . ." Although the allegations in the complaint indicate defendant McKeever's questioning was professionally negligent, the complaint does not allege facts sufficient to allow an inference that defendant McKeever's conduct was intentionally aimed at eliciting a false accusation from N.P. or that defendant McKeever willfully and knowingly disregarded facts that would exonerate plaintiff, as was alleged in *Turner* and *West*. I, therefore, would hold, as the majority does, that the trial court properly dismissed plaintiff's IIED claim as asserted against defendant McKeever.

Turning to plaintiff's claim for negligent infliction of emotional distress ("NIED"), I would hold that the trial court properly dismissed that claim on the grounds that plaintiff has failed to allege facts sufficient to show that he has suffered severe emotional distress amounting, as required by the Supreme Court, to a "type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so." *Johnson v. Ruark Obstetrics & Gynecology Assocs.*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990). Plaintiff has alleged only that he "has suffered and will continue to suffer severe emotional distress, including . . . mental anguish[] [and] depression. I would hold that this allegation is not sufficient to meet the standard set in *Johnson*.

This Court has held that in order to withstand a motion to dismiss for failure to state a claim, the allegations of distress must contain "the type, manner, or degree of severe emotional distress [the plaintiff] claims to have experienced." *Horne v. Cumberland Cnty. Hosp. Sys.*,

Inc., 228 N.C. App. 142, 149, 746 S.E.2d 13, 20 (2013). Although "chronic depression" is a condition identified in *Johnson* as sufficient to support a claim for NIED, 327 N.C. at 304, 395 S.E.2d at 97, plaintiff here has not alleged any other facts indicating a diagnosis of or treatment for his depression or that his depression was disabling in any respect. *See Fox v. Sara Lee Corp.*, 210 N.C. App. 706, 715, 709 S.E.2d 496, 502 (2011) ("Thus, Plaintiff's allegations, construed liberally in her favor, suggest that she had been placed on medical leave, had 'a complete nervous breakdown[,]' and became unable to manage her affairs, all at around the same time.") Even construing the complaint liberally, I cannot find plaintiff's allegations of severe emotional distress sufficient to establish a claim for NIED and, therefore, agree with the majority opinion that the trial court properly dismissed that claim as well. *See also Pierce v. Atl. Grp., Inc.*, 219 N.C. App. 19, 32, 724 S.E.2d 568, 577 (2012) (holding that plaintiff failed to sufficiently allege severe emotional distress when complaint simply alleged that plaintiff experienced serious stress that severely affected his relationship with his wife and family members). Consequently, I concur in the result.

TYSON, Judge, dissenting.

The plurality and the concurring in the result only opinions uphold the trial court's dismissal of plaintiff's claims of intentional and negligent infliction of emotional distress for failure to state a claim pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Their opinions hold plaintiff: (1) failed to allege sufficient facts depicting conduct by defendant McKeever to "meet the threshold of extreme and outrageous conduct;" and (2) failed to allege sufficient facts to indicate it was reasonably foreseeable to defendant McKeever that her conduct would cause Plaintiff severe emotional distress. I respectfully dissent from both conclusions.

I vote to hold plaintiff's complaint, taken as true, alleged sufficient facts under "notice pleading" to assert defendant McKeever engaged in extreme and outrageous conduct to satisfy that element of the tort of intentional infliction of emotional distress. I also vote to hold plaintiff alleged sufficient facts to assert it was reasonable for defendant McKeever to foresee her conduct could cause plaintiff severe emotional distress to satisfy that element of the tort of negligent infliction of emotional distress. I would reverse the Rule 12(b)(6) failure to state a claim dismissal by the trial court and remand for further proceedings.

I. Standard of Review

The majority's plurality opinion correctly notes this Court's review of a trial court's grant of a motion to dismiss under North Carolina Rule of Civil Procedure 12(b)(6) is *de novo*. *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013).

Numerous cases from our Supreme Court highlight the pleading standard a plaintiff must comply with to survive a Rule 12(b)(6) motion to dismiss: "A complaint is adequate, under notice pleading, if it gives a defendant sufficient notice of the nature and basis of the plaintiff's claim and allows the defendant to answer and prepare for trial." *Burgess v. Busby*, 142 N.C. App. 393, 399, 544 S.E.2d 4, 7, *disc. review improv. allowed*, 354 N.C. 351, 553 S.E.2d 579 (2001) (citing *Redevelopment Comm. v. Grimes*, 277 N.C. 634, 645, 178 S.E.2d 345, 351-52 (1971)). As a general rule, "a complaint should not be dismissed for insufficiency *unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.*" *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (emphasis original) (citation omitted); *see also Fussell v. N.C. Farm Bureau Mut. Ins. Co.*, 364 N.C. 222, 227, 695 S.E.2d 437, 441 (2010) ("A trial court should not grant a motion to dismiss unless it is certain that the plaintiff could prove no set of facts that would entitle him or her to relief." (citation omitted)).

II. Extreme and Outrageous Conduct

Applying this standard of review as enunciated by our Supreme Court, the allegations in plaintiff's complaint are sufficient to support the "extreme and outrageous" element of an intentional infliction of emotional distress claim. This Court has held that "whether the alleged conduct on the part of the defendant 'may reasonably be regarded as extreme and outrageous' " is "initially a question of law[.]" *Burgess*, 142 N.C. App. at 399, 544 S.E.2d at 7 (citation omitted). The alleged conduct in an intentional infliction of emotional distress claim must "exceed[] all bounds of decency tolerated by society[.]" *West v. King's Dept. Store, Inc.*, 321 N.C. 698, 704, 365 S.E.2d 621, 625 (1988).

The plurality opinion concludes plaintiff has "fail[ed] to assert any facts depicting conduct[] that meet[s] the threshold of extreme and outrageous conduct[.]" I disagree and conclude the allegations presented in plaintiff's complaint alleged sufficient facts that, if proven, tend to show defendant McKeever's conduct "exceed[ed] all bounds usually tolerated by a decent society[.]" *Id.*

Plaintiff alleged the following facts in his complaint: Noah's mother, and plaintiff's former wife, Shapiro, contacted DSS during the pendency of child custody litigation and alleged, without any foundation, Plaintiff had sexually assaulted Noah.

DSS involved the Huntersville Police Department ("HPD"), and both agencies conducted concurrent investigations into Shapiro's allegations. On 19 April 2011, HPD concluded there was no probable cause to arrest or charge plaintiff and closed its investigation after interviewing, among others, plaintiff, Shapiro, and Noah. The same day, DSS also found the allegations against plaintiff to be unsubstantiated, and closed its investigation.

Defendant McKeever is a licensed clinical social worker who conducted therapy sessions with plaintiff's sons, including 10-year-old Noah, beginning a month later on 19 May 2011. During all therapy sessions, Noah never displayed any signs nor reported to defendant McKeever he had ever been the victim of any sexual abuse perpetrated by Plaintiff or anyone else.

On 9 June 2011, defendant McKeever conducted a forensic interview with Noah "aimed at eliciting. . . a report of sexual abuse" from him. Plaintiff alleged defendant McKeever "knew or should have known" she should not have conducted the 9 June 2011 interview in which she allegedly used "overly suggestive questioning," "over-interpretations," and other "means and methods known or that she should have known to produce inaccurate and unreliable results." Plaintiff attempted to communicate with defendant McKeever by leaving a voicemail requesting she contact him, but defendant McKeever never responded or returned plaintiff's call.

As our Supreme Court has stated, when an appellate court reviews "a motion to dismiss for failure to state a claim upon which relief can be granted, N.C. R. Civ. P. 12(b)(6), all allegations of fact are taken as true[.]" *Jackson v. Bumgardner*, 318 N.C. 172, 174-75, 347 S.E.2d 743, 745 (1986). Taking these allegations as true, as we must, plaintiff contends defendant McKeever, a licensed therapist, and in the total absence of any history, signs, or factual basis, used suggestive questioning and other unreliable methods to purposefully elicit an allegation of sexual abuse by a ten-year-old boy against his father. Noah had never previously made any allegation to defendant McKeever.

Defendant McKeever is alleged to have, along with the other defendants, thereafter "engaged in further conduct that perpetuated and/or

reinforced [Noah's] report, causing further damage." The trial court in plaintiff's and Shapiro's child custody case found as fact the allegations of sexual abuse against plaintiff "were false and that plaintiff 'unequivocally did not sexually abuse [Noah].' " *Piro v. Piro*, ___ N.C. App. ___, 770 S.E.2d 389, 2015 N.C. App. LEXIS 118, *2 (2015) (unpublished) (emphasis original).

The plurality posits: "Unwittingly or not, plaintiff's complaint causes one to speculate that the allegations of sexual abuse upon his children was a major concern to the trial court and led to the two year no contact order against plaintiff." "[O]ne could. . . infer," the plurality continues, "that plaintiff's own actions, not those of defendant McKeever, provided the impetus for what plaintiff claims as the denial of 'substantive and meaningful contact with the Boys.' "

Under the required standard of review, the trial court and this Court *must* take all allegations of fact as true and cannot weigh those facts. *Jackson*, 318 N.C. at 174-75, 347 S.E.2d at 745. In his complaint, plaintiff alleged that as a result of defendant McKeever's conduct, he was denied substantive and meaningful contact with his sons for years and was also forced to spend years in litigation regarding custody and visitation. It is not the duty, nor the province, of this Court under our standard of review of the order dismissing plaintiff's claims pursuant to Rule 12(b)(6) to speculate or question the reason for the no contact order in contravention of plaintiff's well-pleaded allegations of fact stating the reason therefore.

This Court "has set a high threshold for a finding that conduct meets the standard" of extreme and outrageous conduct. *Dobson v. Harris*, 134 N.C. App. 573, 578, 521 S.E.2d 710, 715 (1999), *rev'd on other grounds*, 352 N.C. 77, 530 S.E.2d 829 (2000); *see also Johnson v. Colonial Life & Accident Ins. Co.*, 173 N.C. App. 365, 373, 618 S.E.2d 867, 872 (2005) ("Conduct is extreme and outrageous when it is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." (citations omitted)).

Our Supreme Court has held conduct to be extreme and outrageous in circumstances I find to be much less "atrocious" or "intolerable" than the allegations made by plaintiff here.

In *Stanback v. Stanback*, our Supreme Court held a plaintiff had properly stated a claim for intentional infliction of emotional distress sufficient to survive a Rule 12(b)(6) motion by alleging the defendant

breached a contract, the breach was "wilful, malicious, calculated, deliberate and purposeful," and that such breach caused him to suffer "great mental anguish and anxiety." *Stanback*, 297 N.C. 181, 198, 254 S.E.2d 611, 622-23 (1979).

Likewise, in *West v. King's Dept. Store, Inc.*, Mr. and Mrs. West ("the plaintiffs") traveled to a discount department store looking for bargains. *West*, 321 N.C. at 699, 365 S.E.2d 621, 622. While at the store, the manager accused Mr. West of stealing merchandise, and threatened to have him arrested if the goods were not returned. *Id.* Mr. West showed the manager a receipt for the allegedly stolen merchandise and asked him not to involve his wife in the dispute, because she was an outpatient at a local hospital and could not handle the aggravation and anxiety. *Id.* at 700, 365 S.E.2d at 623. Ignoring the warning, the manager confronted Mrs. West and also accused her of stealing merchandise. *Id.*

The plaintiffs sued the store for, *inter alia*, intentional infliction of emotional distress. *Id.* The trial court granted the defendant's motion for a directed verdict as to the claim, and this Court affirmed. *Id.* at 704, 365 S.E.2d at 625. Quoting the dissenting Judge at the Court of Appeals, our Supreme Court reversed and held the conduct of the store manager was sufficiently extreme and outrageous to survive a motion for a directed verdict:

> Few things are more outrageous and more calculated to inflict emotional distress on innocent store customers that have paid their good money for merchandise and have in hand a document to prove their purchase than for the seller or his agent, disdaining to even examine their receipt, to repeatedly tell them in a loud voice in the presence of others that they stole the merchandise and would be arrested if they did not return it.

Id. (quoting *West v. King*, 86 N.C. App. 485, 358 S.E.2d 386 (Phillips, J., dissenting).

I believe the allegations that defendant McKeever used suggestive questioning and other techniques specifically aimed at eliciting a false allegation of sexual abuse by a ten-year-old boy against his father, are more "atrocious" and "intolerable" than the facts our Supreme Court found to be extreme and outrageous in *Stanback* and *West*. Plaintiff has alleged facts that, if proven, would constitute extreme and outrageous conduct and fabrication of a false history by defendant McKeever which "exceeds all bounds of decency tolerated by society[.]" *West*, 321 N.C.

at 704, 365 S.E.2d at 625. The plurality's opinion erroneously weighs the evidence and "speculates" to reach its conclusion to the contrary.

III. Reasonably Foreseeable Nature of Plaintiff's Emotional Distress

The plurality opinion also concludes plaintiff's complaint contains "no allegations. . . which would indicate that it was reasonably foreseeable that McKeever's conduct – i.e. her interview and counseling of plaintiff's child – would cause *plaintiff* severe emotional distress and anguish." I disagree.

Sufficient allegations in plaintiff's complaint, if proven, would show plaintiff's severe emotional distress was, or should have been, reasonably foreseeable to defendant McKeever. Plaintiff alleged defendant McKeever: (1) "specifically targeted plaintiff and/or was overly suggesting of improper behavior by Plaintiff" in her questioning of Noah; (2) conducted an interview with Noah "aimed at eliciting. . . a report of sexual abuse" against plaintiff; (3) had "knowledge of the risks attendant to her conduct including the risks that DSS. . . would investigate and prohibit" plaintiff from visiting his sons; and (4) had knowledge that the risks were imminent and closely related to" her conduct and such risks were "the reasonably foreseeable result of [her] conduct." Plaintiff further alleges defendant McKeever knew or reasonably should have known her conduct failed to follow proper policies and procedures.

Taken as true, plaintiff alleges defendant McKeever used inappropriate means and methods in contravention of applicable policies and procedures, to intentionally elicit a false criminal report of sexual abuse by a ten-year-old boy against his father while knowing this conduct imminently risked plaintiff's ability to parent and interact with his sons. These allegations are sufficient to show defendant McKeever's actions were "reasonably foreseeable" to "cause the plaintiff severe emotional distress." *Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A.*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990) (citations omitted).

IV. Conclusion

"All allegations of fact are taken as true[.]" *Jackson*, 318 N.C. at 174-75, 347 S.E.2d at 745. At this very early point in the proceedings, plaintiff's allegations, taken as true, are sufficient to show defendant engaged in extreme and outrageous conduct, and that it was reasonably foreseeable her conduct would cause plaintiff severe emotional distress to survive a Rule 12(b)(6) motion to dismiss.

I vote to reverse the judgment of the trial court and remand for further proceedings on plaintiff's claims. I respectfully dissent.

THE ESTATE OF DONNA S. RAY, BY THOMAS D. RAY AND ROBERT A. WILSON, IV, ADMINISTRATORS OF THE ESTATE OF DONNA S. RAY, AND THOMAS D. RAY, INDIVIDUALLY, PLAINTIFFS

v.

B. KEITH FORGY, M.D., P.A., INDIVIDUALLY AND AS AGENT/APPARENT AGENT OF GRACE HOSPITAL, INC., GRACE HEALTH CARE SYSTEM, INC., BLUE RIDGE HEALTH CARE SYSTEMS, INC., CAROLINAS HEALTH CARE SYSTEM, INC., AND AS AN AGENT/APPARENT AGENT, EMPLOYEE AND SHAREHOLDER OF MOUNTAIN VIEW SURGICAL ASSOCIATES, AND GRACE HOSPITAL, INC., GRACE HEALTHCARE SYSTEM, INC., BLUE RIDGE HEALTHCARE SYSTEM, INC., AND/OR CAROLINAS HEALTHCARE SYSTEM, INC., DEFENDANTS

No. COA15-236

Filed 16 February 2016

1. Appeal and Error—interlocutory orders and appeals—medical review committee privilege

Orders compelling discovery of materials purportedly protected by the medical review privilege or work product doctrine are immediately reviewable on appeal despite their interlocutory nature.

2. Discovery—medical review committee documents—statutory privilege

The trial court erred in a medical malpractice action by ordering the hospital defendants to produce documents which the hospital contended were covered by the medical review committee privilege under N.C.G.S. § 131E-95.

Appeal by defendants from order entered 19 November 2014 by Judge Forrest Donald Bridges in Burke County Superior Court. Heard in the Court of Appeals 23 September 2015.

Pinto Coates Kyre & Bowers, PLLC, by Paul D. Coates and Jon Ward, for plaintiff-appellees.

Roberts & Stevens, P.A., by Phillip T. Jackson and Ann-Patton Hornthal, for defendant-appellants Grace Hospital, Inc., Blue Ridge HealthCare System, Inc., Grace HealthCare System, Inc., and Carolinas HealthCare System, Inc.

McCULLOUGH, Judge.

Grace Hospital, Inc., Blue Ridge Healthcare System, Inc., Grace HealthCare System, Inc., and Carolinas HealthCare System, Inc.

(hereinafter referred to as the "hospital defendants") appeal from an order of the trial court, denying in part and granting in part, their motion for a protective order and plaintiffs' motion to compel. For the reasons stated herein, we reverse the order of the trial court.

I. Background

On 25 August 2004, plaintiffs for the Estate of Donna S. Ray, by Thomas D. Ray and Robert A. Wilson, IV, administrators of the Estate of Donna S. Ray, and Thomas D. Ray, individually, filed a complaint against defendants B. Keith Forgy, M.D., P.A., ("Dr. Forgy") Individually and as Agent/Apparent Agent of Grace Hospital, Inc., and/or Grace Healthcare System Inc., and/or Blue Ridge Healthcare System Inc., and/or Carolinas Healthcare System Inc., and as an Agent/Apparent Agent, Employee and Shareholder of Mountain View Surgical Associates ("Mountain View"), and Grace Hospital, Inc., and/or Grace Healthcare System, Inc., and/or Blue Ridge Healthcare System, Inc., and/or Carolinas Healthcare System, Inc. In this medical malpractice suit, plaintiffs alleged that from 12 August 2003 through 16 September 2003, Donna S. Ray was a patient of Mountain View Surgical Associates and was in the care of its employee, Dr. Forgy. Plaintiffs further alleged that from August 7 through 16, 2003, and September 10 through 16, 2003, Donna S. Ray was a patient admitted to the hospital defendants and in the care of their employees, servants, or agents. Plaintiffs alleged that defendants' negligent acts caused the suffering and injuries of Donna S. Ray and Thomas D. Ray and proximately caused the death of Donna S. Ray.

On 15 November 2007, the hospital defendants filed a motion for summary judgment. On 20 November 2007, Dr. Forgy and Mountain View filed a motion for summary judgment. On 21 December 2007, the trial court entered summary judgment in favor of the hospital defendants. On 6 January 2008, the trial court denied Dr. Forgy and Mountain View's motion for summary judgment.

On 16 January 2008, plaintiffs entered notice of appeal to our Court from the 21 December 2007 order of the trial court, entering summary judgment in favor of the hospital defendants. On 3 March 2009, our Court dismissed plaintiffs' appeal as interlocutory. *Estate of Ray v. Keith Forgy, M.D., P.A.*, 195 N.C. App. 597, 473 S.E.2d. 799, COA 15-236 (9 March 2009) (unpub.), *available* at 2009 WL 513009 ("*Ray I*").

Following this Court's decision in *Ray I*, plaintiffs, Dr. Forgy, and Mountain View filed a joint motion to submit their case to binding arbitration, which the trial court granted on 6 January 2011. Two of three arbitrators concluded that Dr. Forgy and Mountain View were liable to

the Estate of Donna S. Ray in the amount of $4 million. The panel of arbitrators unanimously denied the claim of Thomas D. Ray, individually, for loss of consortium. On 1 May 2012, the trial court entered the arbitration award as a final judgment.

On 18 May 2012, the hospital defendants filed notice of appeal to our Court. In an opinion filed 7 May 2013, our Court held that the trial court did not err in granting summary judgment in favor of the hospital defendants on the theory of apparent agency. However, our Court held that the trial court erred by granting summary judgment in favor of the hospital defendants on the theory of corporate negligence. *Estate of Ray v. Forgy*, 227 N.C. App. 24, 744 S.E.2d 468 (2013) ("*Ray II*"). The hospital defendants appealed the decision in *Ray II* to the North Carolina Supreme Court but the North Carolina Supreme Court denied their petition for discretionary review on 18 December 2013. *Estate of Ray v. Forgy*, 367 N.C. 271, 752 S.E.2d 475 (2013).

On 12 May 2013, plaintiffs moved for partial summary judgment on the issues of Dr. Forgy and Mountain View's "negligence in this case and the damages resulting therefrom as set forth in the Arbitration Award and Final Judgment in this case." On 2 July 2014, the trial court entered an order of partial summary judgment in favor of plaintiffs, holding that the hospital defendants were precluded from "contesting or otherwise litigating the issues of the negligence of [Dr. Forgy] and Mountain View[] and the Corporate Defendants are likewise precluded from contesting or otherwise litigating the amount of damages as reflected in the Court's prior judgment of May 1, 2012[.]" The order provided that "[t]he only issue remaining for trial shall be the negligence of the corporate defendants."

On 1 August 2014, the hospital defendants filed a motion for summary judgment. The trial court denied the hospital defendants' motion for summary judgment on 18 September 2014. The hospital defendants appealed from the 18 September 2014 order, denying their motion for summary judgment, to our Court. Our Court dismissed this appeal on 3 June 2015. ("*Ray III*").

During this same time period, on 5 June 2014, plaintiffs filed a motion to compel, seeking the production of all insurance policies covering the hospital defendants for acts of negligence and medical malpractice. Plaintiffs served interrogatories to the hospital defendants on 11 July 2014. Also on 11 July 2014, plaintiffs filed a request for production of documents to the hospital defendants. Plaintiffs sought documents regarding the following: the complete file relating to Dr. Forgy's malpractice

insurance coverage from 1991 to 2004; all documents regarding the re-credentialing of Dr. Forgy at Grace Hospital from 2001 through 2004; all documents relating to Dr. Forgy's malpractice insurance coverage from any source; and copies of all queries made to the National Practitioner Database by the hospital defendants regarding Dr. Forgy and responses from the National Practitioner Database to the hospital defendants. Plaintiffs also filed another motion to compel responses to deposition questions propounded in 2007 on 11 July 2014.

In response to plaintiffs' discovery requests, on 21 July 2014, Michelle R. Minor, the Director of Medical Staff Services for Blue Ridge HealthCare Hospitals, Inc. ("Blue Ridge"), and Thomas Eure, the corporate designee for Grace Hospital, Inc. and Blue Ridge HealthCare System, Inc., provided affidavits for the hospital defendants. On 21 July 2014, the hospital defendants made a motion for an *in camera* review of Sealed Exhibit 1 of both Minor and Eure's affidavits. The motion stated that Sealed Exhibit 1 of both affidavits contained information that was privileged, confidential, or protected from discovery under State law or Federal law and regulations. Specifically, the motion argued that Sealed Exhibit 1 of both affidavits requested information that was privileged under N.C. Gen. Stat. §§ 131E-76(5), 131E-101(8), 131E-107, 90-21.22A, and not discoverable pursuant to N.C. Gen. Stat. §§ 131E-95(b), 131E-107, 90-21.22A(c), or any other relevant statute.

On 11 August 2014, the hospital defendants served their responses to plaintiffs' interrogatories and request for production of documents. Their responses incorporated a privilege log containing a description of each document contained in Sealed Exhibit 1.

On 15 August 2014, the hospital defendants submitted another affidavit from Michelle R. Minor. Minor testified that the Sealed Exhibit 1 was the complete file of Dr. Forgy, containing the records and material produced by and/or considered by the Medical Review Committees of the Grace Hospital Medical Staff. Minor also testified to the following, in pertinent part:

> 13. Sealed Exhibit 1 contains documents, correspondence, evaluations, and reports pertaining to the proceedings, including records and materials produced by the Medical Review Committees and considered by the medical review committee that are subject to the protection of N.C. Gen. Stat. § § 131E-95 and 90-21.22A.
>
> 14. Sealed Exhibit 1 contains documents including correspondence to and from the Medical Review Committees

and the Hospital Attorneys that are subject to the attorney client privilege and work product doctrine.

15. Sealed Exhibit 1 contains documents and information from the National Practitioner's Data Bank ("NPDB") which is confidential and protected from discovery pursuant to 42 USC § 11137(b); 45 C.F.R. § 60, *et seq.* As the Medical Staff Director, I was responsible for overseeing the Medical Review Committees' requests for information from the NPDB and their responses. Based on the contents of Sealed Exhibit 1, the Medical Review Committees made timely queries regarding Dr. Forgy with the NPDB pursuant to the NPDB regulations.

16. To the extent that Sealed Exhibit 1 also contains documents and information regarding the North Carolina Physician Health Program and physician referral programs, any such items are confidential pursuant to N.C. Gen. Stat. [§] 90[-]21.22(e) and not subject to discovery or subpoena in a civil case. Such material includes peer review activities including investigation, review and evaluation of records, reports and complaints, litigation, and other information relating to the North Carolina Physician Health Program for impaired physicians.

17. Sealed Exhibit 1 also contains Protected Health Information ("PHI"), including but not limited to surgical reports, quality review reports, and complete medical record files of patients, and other documents that contain identifiable patient health information of patients other than the Plaintiff that are subject to protection under the Health Insurance Portability and Accountability Act of 1996, 45 C.F.R. § 160, *et seq*. A covered entity, such as Blue Ridge HealthCare Hospitals, Inc., may only disclose unidentifiable PHI if notice requirements under 45 C.F.R. § 164.512(e) [are met], including that the patients be notified and that the requesting party secure a protective order.

18. Exhibit "B" hereto is the Privilege Log pertaining to the documents contained in Sealed Exhibit 1 and provides the title or description of the documents, the author, the recipients, and the date of the documents contained therein. Said Privilege Log was previously provided to Plaintiff's counsel via e-mail and facsimile on August 12, 2014.

On 10 October 2014, the hospital defendants filed a motion to supplement the amended privilege log which included sixteen (16) additional log entries. Following a hearing held at the 10 October 2014 session of Burke County Superior Court, the trial court entered an order, denying in part and granting in part the hospital defendants' motion for a protective order and plaintiffs' motion to compel on 19 November 2014. The 19 November 2014 order stated that the hospital defendants should provide to plaintiffs 161 log entries out of the 330 log entries contained in the Sealed Exhibit 1 and Supplemental Sealed Exhibit 1 (hereinafter the "subject documents"). The trial court ordered that the hospital defendants need not produce 54 log entries. The hospital defendants were ordered to provide plaintiffs a summary specifying the dates on which the information was requested as to log 276. Lastly, the trial court issued a qualified protective order authorizing the disclosure of log 305 to plaintiffs.

On 19 November 2014, the hospital defendants filed notice of appeal from the 19 November 2014 order denying in part and granting in part the hospital defendant's motion for a protective order and plaintiffs' motion to compel.

II. Discussion

A. Interlocutory Appeal

[1] As a preliminary matter, we note that the 19 November 2014 order is an interlocutory order. "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Stanford v. Paris*, 364 N.C. 306, 311, 698 S.E.2d 37, 40 (2010) (citation omitted). "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Sharpe v. Worland*, 351 N.C. 159, 161, 522 S.E.2d 577, 578 (1999). However,

> [a] party may appeal an interlocutory order under two circumstances. First, the trial court may certify that there is no just reason to delay the appeal after it enters a final judgment as to fewer than all of the claims or parties in an action. Second, a party may appeal an interlocutory order that "affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment."

Meherrin Indian Tribe v. Lewis, 197 N.C. App. 380, 383, 677 S.E.2d 203, 206 (2009) (citations omitted).

Relying on *Hammond v. Saini*, 229 N.C. App. 359, 748 S.E.2d 585 (2013), the hospital defendants argue that because the hospital defendants objected to plaintiffs' discovery requests based on the peer review privilege statutes and the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), the 19 November 2014 order affects a substantial right that might be lost absent immediate appeal. In *Hammond*, our Court held that:

> [a]n order compelling discovery is generally not immediately appealable because it is interlocutory and does not affect a substantial right that would be lost if the ruling were not reviewed before final judgment. However, where a party asserts a privilege or immunity that directly relates to the matter to be disclosed pursuant to the interlocutory discovery order and the assertion of the privilege or immunity is not frivolous or insubstantial, the challenged order affects a substantial right and is thus immediately appealable. For this reason, orders compelling discovery of materials purportedly protected by the medical review privilege or work product doctrine are immediately reviewable on appeal despite their interlocutory nature.

Id. at 362-63, 748 S.E.2d at 588 (citation and quotation marks omitted). Accordingly, we hold that the 19 November 2014 order affects a substantial right and is immediately appealable to this Court.

B. The Medical Review Privilege

[2] The sole issue on appeal is whether the trial court erred in compelling the hospital defendants to disclose the subject documents to plaintiffs. First, the hospital defendants argue that all subject documents are protected from discovery by N.C. Gen. Stat. § 131E-95. We agree.

"Whether or not the party's motion to compel discovery should be granted or denied is within the trial court's sound discretion and will not be reversed absent an abuse of discretion." *Hayes v. Premier Living, Inc.*, 181 N.C. App. 747, 751, 641 S.E.2d 316, 318-19 (2007) (citation omitted). However, "[o]n appeal from a trial court's discovery order implicating the medical review privilege, this Court review[s] de novo whether the requested documents are privileged under N.C. Gen. Stat. § 131E-95(b)." *Hammond*, 229 N.C. App. at 365, 748 S.E.2d at 589 (citation and quotation marks omitted).

The statutes at issue here are contained in the Hospital Licensure Act, codified as Article 5, Chapter 131E of the General Statutes ("the

Act"). Section 95 of the Hospital Licensure Act "creates protection for medical review committees in civil actions against hospitals." *Id.* at 363-64, 748 S.E.2d at 588 (citation omitted). Section 95 "protects from discovery and introduction into evidence medical review committee proceedings and related materials because of the fear that external access to peer investigations conducted by staff committees stifles candor and inhibits objectivity." *Shelton v. Morehead Memorial Hospital*, 318 N.C. 76, 82, 347 S.E.2d 824, 828 (1986) (citation and internal quotation marks omitted). "It is for the party objecting to discovery [of privileged information] to raise the objection in the first instance and he has the burden of establishing the existence of the privilege." *Bryson v. Haywood Regional Medical Center*, 204 N.C. App. 532, 536, 694 S.E.2d 416, 420 (2010) (citation omitted).

N.C. Gen. Stat. § 131E-95 provides as follows, in pertinent part:

> (b) The proceedings of a medical review committee, the records and materials it produces and the materials it considers shall be confidential and not considered public records within the meaning of G.S. 132-1 . . . and shall not be subject to discovery or introduction into evidence in any civil action against a hospital . . . which results from matters which are the subject of evaluation and review by the committee. . . . However, information, documents, or records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of the committee.

N.C. Gen. Stat. § 131E-95(b) (2002).

> By its plain language, N.C. Gen. Stat. § 131E-95 creates three categories of information protected from discovery and admissibility at trial in a civil action: (1) proceedings of a medical review committee, (2) records and materials produced by a medical review committee, and (3) materials considered by a medical review committee.

Woods v. Moses Cone Health System, 198 N.C. App. 120, 126, 678 S.E.2d 787, 791-92 (2009). "[D]ocuments and information which are otherwise immune from discovery under [N.C. Gen. Stat.] § 95 do not . . . lose their immunity because they were transmitted to persons outside the medical review committee." *Id.* at 127-28, 678 S.E.2d at 792 (citation omitted).

N.C. Gen. Stat. § 131E-76(5) in turn defines "medical review committee" as "a committee . . . of a medical staff of a licensed hospital . . .

which is formed for the purpose of evaluating the quality, cost of, or necessity for hospitalization or health care, including medical staff credentialing." N.C. Gen. Stat. § 131E-76(5) (2002).

The hospital defendants maintain that the medical staff at Grace Hospital, Inc. ("Grace") created medical review committees ("MRC") that fit within the meaning of the Act and that Blue Ridge maintained these MRCs after the merger of Valdese General Hospital, Inc. and Grace. In response to plaintiffs' 11 July 2014 discovery requests, the hospital defendants filed the affidavit of Michelle Minor on 21 July 2014. Minor testified that she was the Director of Medical Staff Services for Blue Ridge. The hospital defendants also filed a second affidavit from Minor on 15 August 2014, in which she testified to the following, in pertinent part:

> 6. The Medical Staff of Grace Hospital, Inc. created a Medical Review Committee(s), as that term is defined in N.C. Gen. Stat. § 131E-76 and/or N.C. Gen. Stat. § 90-21.22A, for the purpose of credentialing or re-credentialing physicians and for the purpose of reviewing performance of physicians on staff at Grace Hospital. The Medical Review Committees of the Medical Staff of Grace Hospital are identified in Section 7 of the Medical Staff Bylaws. The 2001 and 2003 Medical Staff Bylaws of Grace Hospital, Inc. are Exhibits F and G to the 15 November 2007 Affidavit of Thomas Eure and also Exhibit A to the 21 July 2014 Affidavit of Michelle Minor are incorporated herein.
>
> 7. The purpose of the Medical Staff Committees listed in Section 7 of the 2001 and 2003 versions of the Medical Staff Bylaws included evaluating the quality, cost of, or necessity for hospitalization or health care, including medical staff credentialing. Specifically the three medical review committees listed in this paragraph and described in Section 7 of the 2001 and 2003 versions of the Medical Staff Bylaws were formed for the purpose of evaluating the quality, cost of, or necessity for hospitalization or health care, including medical staff credentialing.
>
> 8. During and after the merger [(Blue Ridge was the surviving corporation after Valdese General Hospital, Inc. was merged into Grace Hospital, Inc.)] . . ., the Medical Staff of Blue Ridge HealthCare Hospitals, Inc., including Grace Hospital maintained Medical Review Committees,

> as that term is defined in N.C. Gen. Stat. § 131E-76 and/or N.C. Gen. Stat. § 90-21.22A, for the purpose of credentialing and re-credentialing physicians on staff at Blue Ridge HealthCare Hospitals, Inc.
>
> 9. The Medical Staff Bylaws attached hereto as Exhibit A, provided that the Medical Review Committees in existence at Grace Hospital at the time relevant to this lawsuit, included but were not limited to the following: (a) The Executive Committee; (b) The Credentials Subcommittee of the Executive Committee; and (c) The Quality Improvement Committee. The purpose of the Medical Staff Committees listed in Section 7 of the 2001 and 2003 versions of the Medical Staff Bylaws attached hereto as Exhibit "A" included evaluating the quality, cost of, or necessity for hospitalization or health care, including medical staff credentialing.

After thoroughly reviewing the medical staff bylaws of Grace, we agree with the hospital defendants that the MRCs created by Grace and maintained by Blue Ridge are "medical review committees" within the meaning of the Act. Plaintiffs do not challenge this classification.

The hospital defendants argue that Minor's affidavit establishes that the subject documents, maintained by Grace's MRCs contain "records and materials produced by and/or considered by the Medical Review Committees of the Grace Hospital Medical Staff." Accordingly, the hospital defendants assert that the subject documents fall within at least one of the three categories of information protected by N.C. Gen. Stat. § 131E-95. Minor's 15 August 2015 affidavit provided as follows, in pertinent part:

> 10. As Director of Medical Staff Services at Blue Ridge HealthCare Hospitals, Inc., I am primarily responsible for overseeing the administrative functions of these Medical Review Committees, including but not limited to managing and overseeing Medical Review Committee correspondence, document production, requests for information from insurance carriers, other hospitals or the National Practitioners Data Bank, as well as maintenance of the credentialing files for physicians on the medical staff and assistance with the Medical Review Committee proceedings including peer review, quality control and credentialing and re-credentialing processes.

> 11. The document which is *in camera* Sealed Exhibit 1 to the Minor Affidavit filed on 21 July 2014, is the complete file of Dr. Forgy that contains **the records and materials produced by and/or considered by** the Medical Review Committees of the Grace Hospital Medical Staff described in the preceding paragraphs as it relates to Dr. Forgy. The document which is *in camera* Sealed Exhibit 1 will be provided to the Court for *in camera* inspection and is incorporated herein.
>
> 12. I have reviewed and I am familiar with the documents contained in Sealed Exhibit 1.
>
> 13. Sealed Exhibit 1 contains documents, correspondence, evaluations, and reports pertaining to the proceedings, including records and materials produced by the Medical Review Committees and considered by the medical review committee that are subject to the protection of N.C. Gen. Stat. § § 131E-95 and 90-21.22A.

(emphasis added).

Plaintiffs argue that Minor's affidavit is insufficient to establish that all 330 log entries ordered to be produced by the trial court are privileged pursuant to N.C. Gen. Stat. § 131E-95. Plaintiffs contend that Minor's affidavit is conclusory and rely on *Hammond v. Saini*, 229 N.C. App. 359, 748 S.E.2d 585 (2013), for their arguments.

In *Hammond*, the patient plaintiff filed a negligence action against multiple medical defendants. *Id.* at 361, 748 S.E.2d at 587. The defendants objected to the plaintiff's discovery requests based on, *inter alia*, medical review privilege. *Id.* The *Hammond* Court held that the medical defendants failed to demonstrate that their "Root Cause Analysis Team" qualified as an MRC pursuant to N.C. Gen. Stat. § 131E-76(5). *Id.* at 366, 748 S.E.2d at 590. The *Hammond* Court further held that even assuming, *arguendo*, that the defendants could establish that the "Root Cause Analysis Team" was an MRC, the defendants would have been required to present evidence tending to show that the disputed documents were among the three categories of protected information pursuant to N.C. Gen. Stat. § 131E-95. *Id.* at 367, 478 S.E.2d at 590. The Court stated as follows:

> [T]hese are substantive, not formal, requirements. Thus, in order to determine whether the peer review privilege applies, a court must consider the circumstances

> surrounding the actual preparation and use of the disputed documents involved in each particular case. The title, description, or stated purpose attached to a document by its creator is not dispositive, nor can a party shield an otherwise available document from discovery merely by having it presented to or considered by a quality review committee.

Id. at 367, 748 S.E.2d at 590-91 (citation omitted). Our Court noted that the defendants failed to submit any evidence regarding who produced or prepared a challenged document, the "RCA Report." The RCA Report identified the event that is the subject of the report and the members of the team but did not list the document's author. The defendants, relying on an affidavit, argued that the affidavit established that the RCA Report was produced by the RCA Team. *Id.* at 367, 748 S.E.2d at 591. However, the affidavit only stated that " '[a] Root Cause Analysis Report *was prepared*[,]' . . . neither identif[ying] the RCA Team members – individually or collectively – as the author of the RCA Report nor otherwise reveal[ing] the document's author." *Id.* The Court also rejected the defendants' assertions that "Risk Management Worksheets" and meeting notes were privileged because it was not clear who prepared them. *Id.* at 367-68, 748 S.E.2d at 591. The Court held that the defendants failed to sustain their burden of proving that the documents were privileged under N.C. Gen. Stat. § 131E-95 and stated that "[t]he mere submission of affidavits by the party asserting the medical review privilege does not automatically mean that the privilege applies. Rather, such affidavits must demonstrate that each of the statutory requirements concerning the existence of the privilege have been met." *Id.* at 369, 748 S.E.2d at 592.

We find *Hammond* distinguishable from the circumstances of the present case. In *Hammond*, the affidavit produced by the defendants failed to demonstrate that each of the statutory requirements concerning the existence of the privilege under N.C. Gen. Stat. § 131E-95 were met. Here, the hospital defendants presented Minor's affidavits and the Medical Staff bylaws of Grace to establish that their MRCs qualified as MRCs pursuant to the meaning contemplated in N.C. Gen. Stat. § 131E-76(5). Minor's affidavit also explicitly stated that the subject documents contained "the records and materials produced by and/or considered by" the MRCs of Grace. Significantly, Minor's 15 August 2015 affidavit also incorporated a detailed privilege log of all the documents in Sealed Exhibit 1. This privilege log included a description of each document, the author or source of each document, the date of the document,

and the recipient of the document. The privilege log established that the subject documents were records and materials produced by the MRCs of Grace and/or materials considered by the MRCs of Grace. Having carefully reviewed the subject documents, we are satisfied that the hospital defendants have fulfilled their burden of demonstrating that the subject documents are privileged pursuant to N.C. Gen. Stat. § 131E-95.[1] Accordingly, we hold that the trial court erred by ordering the hospital defendants to produce the subject documents to plaintiffs and reverse the 19 November 2014 order of the trial court.

C.

The hospital defendants argue that portions of the subject documents are protected from disclosure by N.C. Gen. Stat. § 90-21.22, that portions of the subject documents are protected pursuant to N.C. Gen. Stat. § 8-53, and that portions of the subject documents are protected under HIPAA. Based on our dispositive holding above, we do not find it necessary to reach the hospital defendants' remaining arguments.

III. Conclusion

We reverse the 19 November 2014 order of the trial court, ordering the hospital defendants to produce the subject documents to plaintiffs.

REVERSED.

Judges STEPHENS and ZACHARY concur.

1. We note that "information, in whatever form available, from *original sources other than the medical review committee* is not immune from discovery or use at trial merely because it was presented during medical review committee proceedings; neither should one who is a member of a medical review committee be prevented from testifying regarding information he learned from sources other than the committee itself, even though that information might have been shared by the committee." *Shelton*, 318 N.C. at 83, 347 S.E.2d at 829 (emphasis added).

RENFROW v. N.C. DEPT OF REVENUE

[245 N.C. App. 443 (2016)]

WANDA RENFROW, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF REVENUE, RESPONDENT

No. COA15-472

Filed 16 February 2016

1. Administrative Law—subject matter jurisdiction—time for filing petition

In an action arising from the forced resignation of an employee whose personal tax return contained errors, the Department of Revenue's contention that the Office of Administrative Hearings lacked subject matter jurisdiction because the petitioner failed to file her petition within the time required by N.C.G.S. § 126-38 was rejected. N.C.G.S. § 126-38 did not apply because it had been repealed before petitioner filed her contested case and the record indicates that petitioner complied with the replacement statute.

2. Public Officers and Employees—State employee—forced resignation—dismissal

In an action arising from the resignation of an employee from the Department of Revenue (Department) because her personal tax return contained errors, her resignation under threat of dismissal was, in effect, a dismissal. The Department did not have sufficient grounds to believe that a cause for termination existed and the petitioner's resignation was grievable through the administrative process. The Department relied on a provision of the administrative code stating that an employee may be dismissed for a current incident of unacceptable personal conduct, but waited 19 months after discovering the filing errors and pursuing a disciplinary action.

3. Appeal and Error—preservation of issues—no challenge below

The arguments of the Department of Revenue (DOR) concerning the Office of Administrative Hearings' award of attorney's fees to petitioner were not considered on appeal where the award was based on an affidavit not challenged or responded to by DOR below.

Appeal by respondent from final decision entered 16 January 2015 by Judge Fred G. Morrison Jr. in the Office of Administrative Hearings. Heard in the Court of Appeals 5 November 2015.

Attorney General Roy Cooper, by Assistant Attorney General Peggy S. Vincent, for respondent-appellant.

Bailey & Dixon, LLP, by Sabra J. Faires, for petitioner-appellee.

DIETZ, Judge.

The North Carolina Department of Revenue has an employment policy that many North Carolinians no doubt view as perfectly reasonable: employees working at the agency—which is responsible for administering the tax laws and collecting state taxes—must comply with the tax laws themselves or risk immediate dismissal.

Petitioner Wanda Renfrow is a long-time employee of the Department of Revenue. In 2011, the Department audited Renfrow's tax returns from 2008 to 2010 and discovered a number of unsupported itemized deductions. In March 2012, Renfrow acknowledged the errors, which she maintained were unintentional, and entered into a payment plan to address her accrued tax liability.

Had the Department of Revenue promptly taken disciplinary action at that time, this may have been a very different case. But the Department failed to do so. More than nineteen months passed before Renfrow's division director first informed her that the agency would recommend she be dismissed for unacceptable personal conduct based on her tax filing errors. Renfrow resigned under threat of dismissal and ultimately filed a grievance with the Office of Administrative Hearings alleging that her resignation was involuntary and compelled by the threat of dismissal, and that the Department lacked just cause to dismiss her.

As explained in more detail below, we affirm the Office of Administrative Hearings' final decision. The Department of Revenue could dismiss Renfrow only if her tax errors were "a current incident of unacceptable personal conduct." 25 N.C. Admin. Code 1J.0608. There is no bright-line rule defining what is a "current incident" but, in this case, the Office of Administrative Hearings properly concluded that the Department's nineteen-month delay in taking any action against Renfrow rendered her tax filing errors no longer current. Accordingly, we affirm the final decision of the Office of Administrative Hearings.

Facts and Procedural History

The North Carolina Department of Revenue employed Petitioner Wanda Renfrow for almost 25 years. Renfrow worked as a Returns Processing Supervisor in a division that processed tax payments.

Because of the role the Department of Revenue plays in the collection and processing of state taxes, the Department has a strict policy for its employees that requires full compliance with all tax laws. The policy states that failure to comply with the tax laws will result in disciplinary action including possible dismissal.

In September 2011, the Department of Revenue audited Renfrow's 2008 to 2010 tax filings. That audit concluded that Renfrow had no documentation to support several itemized deductions in those tax years. As a result of this audit, Renfrow owed the State $7,107.00.

On 29 February 2012, the Department issued a notice of assessment against Renfrow for the unpaid tax liability. On 23 March 2012, after meeting with her division director to discuss the erroneous tax returns, Renfrow agreed to a payment plan.

More than nineteen months later, on 5 November 2013, Renfrow's then-acting division director met with her and informed her that the Department of Revenue would recommend that she be dismissed for unacceptable personal conduct based on "violation of the Department's tax compliance policy." In the nineteen months between the meeting with her supervisor and entry into the payment plan, and the later meeting with the division director, no one at the Department of Revenue discussed the tax violations with Renfrow or indicated that she would be disciplined for those tax errors.

On 12 November 2013, at Renfrow's pre-disciplinary conference, Renfrow submitted evidence supporting her position. She also submitted a letter and note addressing her desire to resign rather than be dismissed for cause. The letter stated, "I do not want to be dismissed from my job. I intend to go through the internal review of the decision . . . Before any decision to dismiss me becomes final, I would like the opportunity to have my records reflect that I retired rather than I was dismissed."

The note, which appears to have been submitted as a follow-up to the letter, stated, "[i]f the agency is not going to reinstate my employment with the Department . . . I'am [sic] turning in my letter of retirement from Returns Processing Supervisor effective December 1, 2013."

Following this meeting, the Department decided to follow its previous recommendation to terminate Renfrow. On 13 November 2013, the Department informed Renfrow that, "[w]e are accepting your resignation of retirement effective December 1, 2013 . . . Per your request we have stopped any further disciplinary action."

The next day, Renfrow responded with a letter stating that her retirement was "conditional and the triggering condition is a decision by you that you considered all other options and have made a determination to dismiss me":

> I received your letter today stating that "We are accepting your resignation of retirement effective December 1, 2013" and I want to be sure there is no misunderstanding here. In my November 13, 2013 letter to you, I stated that I do not want to be dismissed from my job and that I intend to go through the internal review of the decision. I further stated that "Before any decision to dismiss me becomes final, I would like the opportunity to have my records reflect that I retired rather than I was dismissed." My retirement is conditional and the triggering condition is a decision by you that you have considered all other options and have made a determination to dismiss me." As I stated in my letter, I love my job and I want to continue to work at the Department. Based on your letter, I can only conclude that you decided to dismiss me. If this conclusion is not correct, please advise me in writing I do not want to retire unless I absolutely have to in order to avoid dismissal.

The Department of Revenue did not respond to this letter.

On 20 December 2013, Renfrow filed a petition for a contested case hearing in the Office of Administrative Hearings arguing that her resignation was involuntary and that the Department did not have just cause to dismiss her.

The Office of Administrative Hearings granted Renfrow's motion for summary judgment and entered a final decision ordering the Department of Revenue to reinstate Renfrow to her former position and provide her with back pay. The Department timely appealed.

Analysis

"In reviewing a final decision in a contested case, the court shall determine whether the petitioner is entitled to the relief sought in the petition based upon its review of the final decision and the official record." N.C. Gen. Stat. § 150B-51. When, as here, a litigant appeals a final decision on grounds of errors of law we conduct a *de novo* review. *Id.*

I. Subject Matter Jurisdiction

[1] The Department of Revenue first argues that the Office of Administrative Hearings lacked subject matter jurisdiction over Renfrow's contested case because Renfrow failed to file her petition within the time required by N.C. Gen. Stat. § 126-38. We reject this argument because § 126-38 does not apply to this case. As the Department of Revenue concedes, the General Assembly repealed § 126-38 "effective August 21, 2013, and applicable to grievances filed on or after that date." Renfrow filed her contested case after 21 August 2013 therefore that statute does not apply.

In its reply brief, the Department of Revenue asserts a new jurisdictional argument—that under N.C. Gen. Stat. § 126-34.01 (the statute that replaced § 126-38), Renfrow "was required to first discuss the matter with the supervisor, and then follow the grievance procedure approved by the State Human Resource Commission." The agency does not explain why it believes Renfrow failed to comply with these statutory requirements; it simply asserts that "[s]he did not do so." Our review of the record reveals the opposite: Renfrow attended a pre-disciplinary conference with the acting director of her division before filing her contested case and ultimately obtained a final agency decision reviewed and approved by the Office of State Human Resources as required by the newly enacted grievance procedures. Accordingly, we reject this newly raised jurisdictional argument as well.

II. Voluntariness of Resignation

[2] The Department of Revenue next argues that Renfrow could not pursue her just cause claim because she chose to resign rather than be dismissed. As explained below, because the Department did not have good cause to believe grounds for termination existed, Renfrow's resignation under threat of dismissal was, in effect, a dismissal.

A state employee cannot pursue a claim for dismissal in the Office of Administrative Hearings unless the employee actually was dismissed. Thus, an employee who voluntarily resigns ordinarily cannot pursue a dismissal claim—after all, a dismissal, by its nature, is an "*involuntary* separation for cause." 25 N.C. Admin. Code 1J.0608 (emphasis added). But courts have held that where "the employer actually lacked good cause to believe that grounds for termination existed," a resignation under threat of dismissal is effectively the same as an involuntary dismissal. *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 167, 174 (4th Cir. 1988). This is a high bar because it does not require the employer to show that there actually were grounds to terminate the employee.

Rather, the employer need only show that, at the time the decision was made, with the facts available to it, the employer had good cause to believe termination was appropriate. So long as this good cause exists, a resignation under threat of dismissal is not a dismissal because the resignation was voluntary.

Here, despite the high bar described above, Renfrow has established that her resignation was involuntary because the Department lacked good cause to believe it could terminate her. The Department relied on a provision of the administrative code stating that an employee "may be dismissed for a *current* incident of unacceptable personal conduct, without any prior disciplinary action." 25 N.C. Admin. Code 1J.0608 (emphasis added). The Department of Revenue discovered Renfrow's tax filing errors on 22 February 2012.[1] The Department sent Renfrow a notice of her tax liability one week later. The following month, Renfrow agreed to a payment plan to repay her tax liability.

Then, *nineteen months* passed before the Department of Revenue chose to pursue any disciplinary action. The Department argues that there should not be a fixed time period defining "current" incidents. It argues that "[r]ather than a length of time certain, allowing a reasonable time under the circumstances would seem more appropriate." We agree. But nineteen months was not reasonable.

The Department has not provided any explanation for why it waited so long before pursuing disciplinary action. It argues that, in some cases, an employee accused of tax errors may want to challenge that finding in an administrative proceeding, forcing the Department to wait for the appeals process to end before disciplining the employee. But that did not happen here. Renfrow acknowledged the errors and entered into a payment plan within a month after the Department of Revenue alerted her to them; she did not appeal or otherwise challenge the agency's decision. Simply put, in the absence of *any* explanation for its nineteen-month delay, we hold that the Department did not have good cause to believe it could pursue disciplinary action under 25 N.C. Admin. Code 1J.0608 because Renfrow's tax errors were no longer a "current incident." Accordingly, Renfrow's resignation was effectively an involuntary dismissal that was grievable through the administrative process. *Stone*, 855 F.2d at 174.

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1. In cases like this one, where employee misconduct is not readily discoverable, whether the misconduct is a "current incident" depends on the amount of time that elapsed between the employer's discovery of the misconduct and the contested disciplinary action.

III. Just Cause for Dismissal

Our conclusion that Renfrow's tax errors were no longer a "current incident" when the Department of Revenue first pursued disciplinary action provides grounds to affirm the decision of the Office of Administrative Hearings. Because the Department was not permitted to dismiss Renfrow for this alleged unacceptable personal conduct under 25 N.C. Admin. Code 1J.0608, it lacked just cause to do so. We affirm the Office of Administrative Hearings' decision on this basis and need not address the other grounds on which that decision is based.

IV. Attorney's Fees Award

[3] Finally, the Department of Revenue challenges the Office of Administrative Hearings' award of attorney's fees to Renfrow. That award is based on an affidavit submitted by Renfrow in the proceeding below, detailing the time spent on this action. The Department did not challenge or respond to that affidavit in the Office of Administrative Hearings, although it had the opportunity to do so. We thus decline to consider these arguments because the Department failed to preserve them by raising them before the Office of Administrative Hearings. *See Phillips v. Brackett*, 156 N.C. App. 76, 80, 575 S.E.2d 805, 808 (2003); *Gray v. North Carolina Dep't of Env't, Health & Nat. Res.*, 149 N.C. App. 374, 379, 560 S.E.2d 394, 398 (2002).

Conclusion

For the reasons discussed above, we affirm the decision of the Office of Administrative Hearings.

AFFIRMED.

Judges McCULLOUGH and TYSON concur.

STATE OF NORTH CAROLINA
v.
JOHNNY ALLDRED

No. COA15-663

Filed 16 February 2016

Appeal and Error—preservation of issues—failure to present arguments

An order directing defendant to enroll in satellite-based monitoring for the remainder of his life was upheld where the issue was raised only for preservation purposes.

Appeal by defendant from order entered 13 January 2015 by Judge Thomas D. Haigwood in Pitt County Superior Court. Heard in the Court of Appeals 27 January 2016.

Attorney General Roy Cooper, *by Special Deputy Attorney General Joseph Finarelli*, *for the State.*

Ryan McKaig for defendant-appellant.

TYSON, Judge.

Johnny Alldred ("Defendant") appeals from an order directing him to enroll in satellite-based monitoring for the remainder of his natural life. We affirm.

I. Background

Defendant was convicted of one count of taking indecent liberties with a child in 1990. In 2006, he was convicted of two counts of misdemeanor sexual battery. On 13 January 2015, the Superior Court of Pitt County held a hearing to determine Defendant's eligibility for satellite-based monitoring. *See* N.C. Gen. Stat. § 14-208.40B(a) (2013) ("When an offender is convicted of a reportable conviction as defined by G.S. 14-208.6(4), and there has been no determination by a court on whether the offender shall be required to enroll in satellite-based monitoring, the Division of Adult Correction shall make an initial determination on whether the offender falls into one of the categories described in G.S. 14-208.40(a)."); N.C. Gen. Stat. § 14-208.40B(b) (2013) ("If the Division of Adult Correction determines that the offender falls into one of the categories described in G.S. 14-208.40(a), the district attorney, representing

the Division of Adult Correction, shall schedule a hearing in superior court for the county in which the offender resides.")

Based on Defendant's convictions from 1990 and 2006, the court found Defendant to be a recidivist sexual offender, and ordered him to be enrolled in satellite-based monitoring for the remainder of his natural life. Defendant appeals.

II. Issues

Defendant argues the superior court's order violates the ex post facto and double jeopardy prohibitions contained within the United States and North Carolina Constitutions.

III. Analysis

Defendant concedes in his brief that North Carolina's appellate courts have previously held that North Carolina's satellite-based monitoring program is a civil regulatory scheme, which does not implicate either the ex post facto or double jeopardy constitutional prohibitions or protections. *See State v. Bowditch*, 364 N.C. 335, 352, 700 S.E.2d 1, 13 (2010) (holding the satellite-based monitoring program does not violate the ex post facto clauses of the state or federal constitutions); *State v. Anderson*, 198 N.C. App. 201, 204-05, 679 S.E.2d 165, 167 (2009) (holding that because the satellite-based monitoring program is civil in nature and does not constitute a punishment, it cannot violate a defendant's constitutional right to be free from double jeopardy), *disc. review denied*, 364 N.C. 436, 702 S.E.2d 491 (2010).

Defendant raises these issues solely for "preservation purposes." Defendant also does not raise or argue any issues regarding the reasonableness of the imposition of satellite-based monitoring under the Fourth Amendment. *Grady v. North Carolina*, __ U.S. __, 135 S. Ct. 1368, 191 L. Ed. 2d 459 (2015).

We are bound by these prior and binding opinions and overrule Defendant's arguments. *See Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993) ("[The Court of Appeals] has no authority to overrule decisions of [the] Supreme Court and [has] the responsibility to follow those decisions until otherwise ordered by the Supreme Court." (quotation marks omitted)); *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

IV. Conclusion

Based upon the issues before us in this appeal, the superior court's order directing Defendant to be enrolled in satellite-based monitoring for the remainder of his natural life is affirmed.

AFFIRMED.

Judges CALABRIA and DAVIS concur.

STATE OF NORTH CAROLINA, Plaintiff
v.
JONATHAN BRANDON BLAKENEY, Defendant

No. COA15-622

Filed 16 February 2016

Constitutional Law—representation by counsel—pro se—trial court's inquiry

Defendant's right to be represented by counsel under the Sixth Amendment was violated where he neither voluntarily waived the right to be represented by counsel nor engaged in such serious misconduct as to warrant forfeiture of the right to counsel without any warning by the trial court. The trial court was required to inform defendant that if he discharged his attorney but was unable to hire new counsel he would be required to represent himself, and was further obligated to conduct the inquiry mandated by N.C.G.S. § 15A-1242 in order to ensure that defendant understood the consequences of self-representation.

Appeal by defendant from judgment entered 18 December 2014 by Judge Christopher W. Bragg in Union County Superior Court. Heard in the Court of Appeals 3 November 2015.

Attorney General Roy Cooper, by Assistant Attorney General Terence Friedman, for the State.

Robinson Bradshaw & Hinson, P.A., by Andrew A. Kasper, for defendant-appellant.

ZACHARY, Judge.

Jonathan Blakeney (defendant) appeals from judgment entered upon a jury verdict finding him guilty of possession of a firearm by a felon and of having attainted the status of an habitual felon. On appeal defendant argues that the trial court erred by requiring defendant to represent himself at trial, on the grounds that defendant neither asked to proceed *pro se* nor engaged in the type of serious misconduct that would result in an immediate forfeiture of defendant's right to counsel without a prior warning. After careful consideration, we agree.

I. Background

On 17 September 2011, deputies with the Union County Sheriff's Department were dispatched to 3921 Blakeney Road to investigate an assault reported at that location. During the investigation, defendant was arrested and charged with possession of a firearm by a felon. After being informed of his *Miranda* rights, defendant provided law enforcement officers with a statement admitting to possession of a firearm. On 7 November 2011, defendant was indicted for possession of a firearm by a felon. On 30 January 2012, defendant signed a waiver of the right to assigned counsel in three cases, including the charge of possession of a firearm by a felon that is the subject of the present appeal.

On 4 November 2013, more than two years after the incident giving rise to the charge of possession of a firearm by a felon, defendant was indicted for attaining the status of an habitual felon. On 6 November 2014, three years after the incident underlying this appeal, the trial court entered an order striking a previously entered order for arrest and continuing the trial of defendant's case until 15 December 2014. Documentation is not included in the record, but the parties agree that defendant had failed to appear for trial in early November, 2014.

The charges against defendant came on for trial on 15 December 2014. Prior to trial, defendant's counsel, Mr. Vernon Cloud, moved to withdraw as defendant's attorney. Mr. Cloud stated that defendant had spoken rudely to him and that defendant no longer wanted him to represent defendant at the pending trial. Defendant agreed that he did not want Mr. Cloud to represent him on the charges of possession of a firearm by a felon and having the status of an habitual felon, but stated that he wished to retain Mr. Cloud as his counsel on other charges then pending against defendant. Defendant did not indicate in any way that he wished to represent himself, but told the trial court that he intended to hire a different attorney, specifically saying, "I've talked to Miles Helms. He's willing to take my case." In response, the trial court told defendant

that he had a right to fire his lawyer, but that "the trial is still going." The trial court and defendant then had the following discussion:

> THE COURT: . . . Mr. Blakeney, you need to understand something. . . . You're not first; you're not even second right now. . . . I'm going to do a motion here in a little bit with Mr. Principe that may or may not dispose of a case. . . . We may start picking a jury and that defendant may decide to plead guilty. Okay? And you have moved from third to first. Okay?
>
> DEFENDANT: Okay.
>
> THE COURT: And we might not know that until later this afternoon; maybe tomorrow morning. Okay? But at that time, when you become first on the list and I call your name, okay, you need to be either in this audience, okay, or unless you have been released and given a number where you can be here in an hour or so where we know that.
>
> DEFENDANT: Yes, sir.
>
> THE COURT: Typically we'll give you that, okay? Get you here in an hour and ready to go. And if you're not, I'm going to issue an order for your arrest.
>
> DEFENDANT: If I could, Your Honor?
>
> THE COURT: Uh huh.
>
> DEFENDANT: Ask for a continuance. This would be my first continuance that I have asked for in my favor.
>
> THE COURT: Right.
>
> DEFENDANT: Of the cases that has been continued has been from the State.
>
> THE COURT: Mr. Blakeney, this is a 2011 case.
>
> DEFENDANT: Yes, sir.
>
> THE COURT: It is 2014. All right. You're third on the list. May or may not get to it, but I'm not going to continue it. It's an old case that needs to be tried.
>
> DEFENDANT: Okay. And I would have been ready to try this case had not been if we could have sat down me and my lawyer sat down with my witnesses and . . . talked about this, this trial.

THE COURT: You still - you're still not number one yet. You still may not - you still may not be tried this week. . . . But you need to be ready to go. . . . [Mr. Cloud,] you are released in case number 11 CRS 55059; the charge of possession of a firearm by a felon, and that is the only case Mr. Blakeney in which you are firing Mr. Cloud. Is that right?

DEFENDANT: Yes, sir.

. . . .

MS. CHUNN: There is a habitual felon as well, Your Honor.

THE COURT: All right. So if -- and I use the word if this case is called for trial, okay, you're going to try Mr. Blakeney on the possession of a firearm by a felon in 11 CRS 55059; and if he is convicted of that . . . you're going to seek habitual felon status against him as well from that same jury.

MS. CHUNN: That's correct, Your Honor.

. . .

THE COURT: Okay. All right. You understand that, Mr. Blakeney?

DEFENDANT: Yes, sir.

THE COURT: Okay. We won't talk about being a habitual felon until and unless you are convicted, if you are convicted of the underlying charge.

. . .

THE COURT: Mr. Blakeney, I'm going to give you this one courtesy, okay? . . . I'm going to have you give to Deputy LaRue here your cell phone number or a number you can be reached. You're going to be on a one hour standby.

DEFENDANT: Okay.

THE COURT: All right. So when I give you a one hour standby, if we call that number, it is disconnected, nobody knows you at that number or whatever, when I call that number, the clock starts and one hour later, if you're not here, I'm going to have the bailiffs call and fail you and I'm going to issue a bond. I'm here the next six months starting in January. I'll know where you're at when we call

> your case for trial next time, okay, because it will be in the Union County Jail. All right?
>
> DEFENDANT: Yes, sir. Yes, sir.
>
> THE COURT: Okay. All right. So that gives you time to get out, go see Mr. Helms, go do whatever you need to do. . . . You're third on the list, and like I said, sometimes third we never reach it. Sometimes third reaches tomorrow morning.
>
> DEFENDANT: Okay.
>
> THE COURT: Okay? All right.
>
> DEFENDANT: Thank you, sir.

Two days later, on 17 December 2014, defendant's case was called for trial, and defendant and the trial court had the following dialog:

> THE COURT: Come on down, sir. Mr. Blakeney, when we spoke on Monday, I told you that you were third on the list and we have reached that level, all right.
>
> DEFENDANT: Okay.
>
> THE COURT: And the State is calling for trial the State of North Carolina versus you, Jonathan Brandon Blakeney. It's case number 11 CRS 55059. It's a charge of possession of a firearm by a felon. All right?
>
> DEFENDANT: Okay.
>
> THE COURT: And as I explained to you the other day, that's a Class G felony, but the State is also, if you are convicted of that felony, I would -- it will never come in front of the jury, no one will ever mention to the jury the fact that the State is also seeking to have you found to be a habitual felon. Okay? We don't talk about being a habitual felon until and unless the jury returns a verdict of guilty of the felony of possession of a firearm. All right?
>
> DEFENDANT: Okay.
>
> THE COURT: If you're found not guilty of possession of a firearm by a felon, the habitual felon case goes away. If you are found guilty of possessing a firearm by a felon, then we have a second part of the trial with the same jury

to determine whether or not you are a habitual felon, and the State would have to prove to the jury beyond a reasonable doubt that you have three prior felony convictions. . . .

DEFENDANT: Okay.

THE COURT: Okay? So that's where we're at. You had mentioned to me Monday that you were attempting to hire Mr. Helms to represent you in this charge. I had released Mr. Cloud from this one case. You had retained him in that one case, in a bunch of cases, but had released him only in this one case. Had you hired Mr. Helms?

DEFENDANT: No, sir, he wouldn't -- he wouldn't take my case. He told me that it would be a waste of time because he didn't have time to even discuss my case with me.

THE COURT: Yes, sir. All right. You prepared to go forward?

DEFENDANT: Yes, sir, I guess -- I mean --

THE COURT: Yes, sir.

DEFENDANT: --my hands are tied. I mean I guess so.

THE COURT: You're going to -- you're going to act as your own attorney? Let me tell you how -- not -- I don't know how much experience you've had in court. We'll call the jury in; I'll explain to the jury what the charges are. I'm going to introduce everybody, introduce you to the jury, tell them what the charge is, introduce Ms. Chunn as the DA for the State. You have entered a plea of not guilty to this charge. Is that correct?

Thereafter, the trial court explains to defendant the process of jury selection, until defendant interrupts:

DEFENDANT: So this is still set, for the record, for the -- . . . that I'm being tried without a lawyer?

THE COURT: Yes, sir, that's all on the record.

DEFENDANT: Okay.

THE COURT: Okay? We did that on Monday. That's -- every - Ms. Trout has been here every day, okay?

DEFENDANT: Okay.

> THE COURT: Everything we do in this court is on the record, all right?
>
> DEFENDANT: Okay.
>
> THE COURT: And it was on the record when you released Mr. Cloud on Monday, all right?
>
> DEFENDANT: Yes, sir.
>
> . . .
>
> THE COURT: And it was on the record that you are representing yourself in this matter; that I denied a continuance because you have waived -- previously waived your right to court appointed counsel and you had hired your own attorney. Okay?
>
> DEFENDANT: Okay.

The record to that point includes no mention of the possibility that defendant would represent himself. Thereafter, the trial proceeded and the State offered the testimony of several witnesses. During the presentation of the State's case, defendant was uniformly polite and deferential to the trial court and to those in the courtroom. Defendant did not object to any of the prosecutor's questions or to the introduction of any evidence, including his inculpatory statement. Defendant presented several witnesses and also testified in a narrative form about the events of 17 September 2011; however, defendant never denied being in possession of a firearm, and defendant's evidence addressed issues that were legally irrelevant to the charge of possession of a firearm by a felon. Following the presentation of evidence and instructions from the trial court, the jury returned a verdict finding defendant guilty of possession of a firearm by a felon.

During the habitual felon stage of the trial, the jury sent the trial court a note asking whether defendant had refused representation by an attorney. The trial court explained to the jurors that this was not a proper matter for their consideration. Out of the presence of the jury, the trial court then expressed its opinion, for the first time during these proceedings, that defendant's request to hire a different attorney had been motivated by defendant's wish to postpone the trial. After the jury returned a verdict finding that defendant had attained the status of an habitual felon, the trial court conducted a sentencing hearing. The trial court found that defendant was a Level IV offender and was to be sentenced as an habitual felon. The court found two mitigating factors:

that defendant supported his family, and that defendant had voluntarily appeared in court throughout the proceedings. The trial court imposed a sentence in the mitigated range of seventy-two to ninety-six months. Defendant appealed to this Court.

II. Standard of Review

Defendant's sole argument on appeal is that the trial court violated defendant's Sixth Amendment right to counsel by requiring defendant to represent himself. " 'It is well settled that *de novo* review is ordinarily appropriate in cases where constitutional rights are implicated.' " *State v. Wray*, 206 N.C. App. 354, 356, 698 S.E.2d 137, 140 (2010) (quoting *Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001)), *disc. review denied*, 365 N.C. 88, 706 S.E.2d 476 (2011).

III. Sixth Amendment Right to Counsel

Defendant argues that the trial court violated his Sixth Amendment right to the assistance of counsel by requiring defendant to proceed *pro se*, despite the fact that defendant did not ask to represent himself, was not warned that he might have to represent himself, and had not engaged in egregious conduct that would justify an immediate forfeiture of his right to counsel without a warning. We agree.

"A criminal defendant's right to representation by counsel in serious criminal matters is guaranteed by the Sixth Amendment to the United States Constitution and Article I, §§ 19, 23 of the North Carolina Constitution." *State v. Hyatt*, 132 N.C. App. 697, 702, 513 S.E.2d 90, 94 (1999) (citing *Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963)). Our appellate courts have recognized two circumstances, however, under which a defendant may no longer have the right to be represented by counsel.

First, a defendant may voluntarily waive the right to be represented by counsel and instead proceed *pro se*. "[W]aiver of the right to counsel and election to proceed *pro se* must be expressed 'clearly and unequivocally.' " *State v. Thomas*, 331 N.C. 671, 673-74, 417 S.E.2d 473, 475 (1992) (quoting *State v. McGuire*, 297 N.C. 69, 81, 254 S.E.2d 165, 173 (1979)). "Once a defendant clearly and unequivocally states that he wants to proceed *pro se*, the trial court . . . must determine whether the defendant knowingly, intelligently, and voluntarily waives the right to in-court representation by counsel." *Thomas*, 331 N.C. at 674, 417 S.E.2d at 476 (citations omitted). A trial court's inquiry will satisfy this constitutional requirement if conducted pursuant to N.C.G.S. § 15A-1242. *Id.* (citation omitted). This statute provides:

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

In this case, neither defendant nor the State asserts that defendant ever asked to represent himself at trial, and our own review of the transcript fails to reveal any evidence that defendant indicated, must less "clearly and unequivocally" requested, that he be permitted to proceed *pro se*. "The record clearly indicates that when defendant signed the waiver of his right to assigned counsel he did so with the expectation of being able to privately retain counsel. Before [the trial court] the defendant stated that he wanted to . . . employ his own lawyer. There is no evidence that defendant ever intended to proceed to trial without the assistance of some counsel." *State v. McCrowre*, 312 N.C. 478, 480, 322 S.E.2d 775, 776-77 (1984). We conclude that the present case is not governed by appellate cases addressing a trial court's responsibility to ensure that a defendant who wishes to represent himself is "knowingly, intelligently, and voluntarily" waiving his right to counsel.

The second circumstance under which a criminal defendant may no longer have the right to be represented by counsel occurs when a defendant engages in such serious misconduct that he forfeits his constitutional right to counsel. Although the right to counsel "is guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I of the North Carolina Constitution," *State v. Montgomery*, 138 N.C. App. 521, 524, 530 S.E.2d 66, 68 (2000), in some situations a defendant may lose this right:

> Although the loss of counsel due to defendant's own actions is often referred to as a waiver of the right to counsel, a better term to describe this situation is forfeiture. "Unlike waiver, which requires a knowing and intentional relinquishment of a known right, forfeiture results in the loss of a right regardless of the defendant's knowledge

> thereof and irrespective of whether the defendant intended to relinquish the right." . . . [A] defendant who is abusive toward his attorney may forfeit his right to counsel.

Montgomery, 138 N.C. App. at 524-25, 530 S.E.2d at 69 (quoting *United States v. Goldberg*, 67 F.3d 1092, 1100 (3d. Cir. Pa. 1995) (other quotation omitted)).

In this case, the State argues that defendant forfeited his right to counsel, relying primarily upon generalized language excerpted from *Montgomery* stating that a forfeiture of counsel "results when the state's interest in maintaining an orderly trial schedule and the defendant's negligence, indifference, or possibly purposeful delaying tactic, combine[ ] to justify a forfeiture of defendant's right to counsel." *Montgomery* at 524-25, 530 S.E.2d at 69 (internal quotation omitted). The State also cites *State v. Quick*, 179 N.C. App. 647, 649-50, 634 S.E.2d 915, 917 (2006), in which this Court cited *Montgomery* for the proposition that "[a]ny willful actions on the part of the defendant that result in the absence of defense counsel constitutes a forfeiture of the right to counsel." *Montgomery* did not, however, include such a broad holding or suggest that "any willful actions" resulting in the absence of defense counsel are sufficient to constitute a forfeiture. Instead, as this Court has observed, forfeiture of the right to counsel has usually been restricted to situations involving egregious conduct by a defendant:

> Although the United States Supreme Court has never directly addressed forfeiture of the right to counsel, the Court's other holdings demonstrate reluctance to uphold forfeiture of a criminal defendant's U.S. Constitutional rights, except in egregious circumstances. . . . Additionally, the federal and state courts that have addressed forfeiture have restricted it to instances of severe misconduct.

Wray, 206 N.C. App. at 358-59, 698 S.E.2d at 140-41 (2010) (citing *Illinois v. Allen*, 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970) (other citations omitted)).

There is no bright-line definition of the degree of misconduct that would justify forfeiture of a defendant's right to counsel. However, our review of the published opinions of our appellate courts indicates that, as discussed in *Wray*, forfeiture has generally been limited to situations involving "severe misconduct" and specifically to cases in which the defendant engaged in one or more of the following: (1) flagrant or extended delaying tactics, such as repeatedly firing a series of attorneys; (2) offensive or abusive behavior, such as threatening counsel, cursing,

spitting, or disrupting proceedings in court; or (3) refusal to acknowledge the trial court's jurisdiction or participate in the judicial process, or insistence on nonsensical and nonexistent legal "rights." The following is a list of published cases from North Carolina in which a defendant was held to have forfeited the right to counsel, with a brief indication of the type of behavior in which the defendant engaged:

> 1. *State v. Montgomery*, 138 N.C. App. 521, 530 S.E.2d 66 (2000): the defendant fired several lawyers, was disruptive and used profanity in court, threw water on his attorney while in court, and was repeatedly found in criminal contempt.
>
> 2. *State v. Quick*, 179 N.C. App. 647, 634 S.E.2d 915 (2006): the defendant in a probation revocation case waived court-appointed counsel in order to hire private counsel, but during an eight month period did not contact any attorney, instead waiting until the day before trial.
>
> 3. *State v. Rogers*, 194 N.C. App. 131, 669 S.E.2d 77 (2008), *disc. review denied*, 363 N.C. 136, 676 S.E.2d 305 (2009): over the course of two years, the defendant fired several attorneys, made unreasonable accusations about court personnel, reported one of his attorneys to the State Bar, accused another of racism, and was warned by the court about his behavior.
>
> 4. *State v. Boyd*, 200 N.C. App. 97, 682 S.E.2d 463, *disc. review denied*, 691 S.E.2d 414 (2009): during a period of more than a year, the defendant refused to cooperate with two different attorneys, repeatedly told one attorney that the case "was not going to be tried," was "totally uncooperative" with counsel, demanded that each attorney withdraw from representation, and "obstructed and delayed" the trial proceedings.
>
> 5. *State v. Leyshon*, 211 N.C. App. 511, 710 S.E.2d 282, *appeal dismissed*, 365 N.C. 338, 717 S.E.2d 566 (2011): for more than a year after defendant was arraigned, he refused to sign a waiver of counsel or state whether or not he wanted counsel, instead arguing that the court did not have jurisdiction and making an array of legally nonsensical assertions about the court's authority.

6. *State v. Cureton*, 223 N.C. App. 274, 734 S.E.2d 572 (2012): the defendant feigned mental illness, discharged three different attorneys, "consistently shouted at his attorneys, insulted and abused his attorneys, and at one point spat on his attorney and threatened to kill him."

7. *State v. Mee*, __ N.C. App. __, 756 S.E.2d 103 (2014): the defendant appeared before four different judges over a period of fourteen months, during which time he hired and then fired counsel twice, was represented by an assistant public defender, refused to state his wishes with respect to counsel, advanced unsupported legal theories concerning jurisdiction, and refused to participate in the trial.

8. *State v. Joiner*, __ N.C. App. __, 767 S.E.2d 557 (2014): the defendant gave "evasive and often bizarre" answers to the court's questions, shouted and cursed at the trial court, smeared feces on the holding cell wall, had to be gagged during trial, threatened courtroom personnel with bodily harm, and refused to answer simple questions.

9. *State v. Brown*, __ N.C. App. __, 768 S.E.2d 896 (2015): like the defendants in *Mee* and *Leyshon*, this defendant offered only repetitive legal gibberish in response to simple questions about representation, and refused to recognize the court's jurisdiction.

In stark contrast to the defendants discussed above, in this case:

1. Defendant was uniformly polite and cooperative. In fact, the trial court found as a mitigating factor that the defendant returned to court as directed during the habitual felon phase, even after he had been found guilty of the underlying offense.

2. Defendant did not deny the trial court's jurisdiction, disrupt court proceedings, or behave offensively.

3. Defendant did not hire and fire multiple attorneys, or repeatedly delay the trial. Although the case was three years old at the time of trial, the delay from September 2011 until August 2014 resulted from the State's failure to prosecute, rather than actions by defendant.

We conclude that defendant's request for a continuance in order to hire a different attorney, even if motivated by a wish to postpone his

trial, was nowhere close to the "serious misconduct" that has previously been held to constitute forfeiture of counsel. In reaching this decision, we find it very significant that defendant was not warned or informed that if he chose to discharge his counsel but was unable to hire another attorney, he would then be forced to proceed *pro se*. Nor was defendant warned of the consequences of such a decision. We need not decide, and express no opinion on, the issue of whether certain conduct by a defendant might justify an immediate forfeiture of counsel without any preliminary warning to the defendant. On the facts of this case, however, we hold that defendant was entitled, at a minimum, to be informed by the trial court that defendant's failure to hire new counsel might result in defendant's being required to represent himself, and to be advised of the consequences of self-representation.

"[W]ith the exception of decisions of the United States Supreme Court, federal appellate decisions are not binding upon either the appellate or trial courts of this State." *State v. Adams*, 132 N.C. App. 819, 820, 513 S.E.2d 588, 589 (citing *State v. McDowell*, 310 N.C. 61, 74, 310 S.E.2d 301, 310 (1984) (holding that appellate courts should treat "decisions of the United States Supreme Court as binding and accord[ ] to decisions of lower federal courts such persuasiveness as these decisions might reasonably command")), *disc. review denied*, 350 N.C. 836, 538 S.E.2d 570 (1999). In this regard, we find persuasive the analysis of this subject in *United States v. Goldberg*, 67 F.3d 1092, 1100 (3d. Cir. Pa. 1995), a leading case on the issue of forfeiture of counsel which has been cited in appellate decisions more than three hundred times, including in five North Carolina cases. *Goldberg* describes three categories of situations involving waiver or forfeiture of representation by counsel. First, the *Goldberg* Court noted that if "a defendant requests permission to proceed *pro se*, *Faretta* requires trial courts to ensure that the defendant is aware of the risks of proceeding *pro se* as a constitutional prerequisite to a valid waiver of the right to counsel." *Goldberg*, 67 F.3d at 1099. The Court next considered forfeiture, which "results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right." *Goldberg* at 1100. The third category posited in *Goldberg* is similar to the present circumstances:

> Finally, there is a hybrid situation ("waiver by conduct") that combines elements of waiver and forfeiture. Once a defendant has been warned that he will lose his attorney if he engages in dilatory tactics, any misconduct thereafter may be treated as an implied request to proceed *pro se* and,

> thus, as a waiver of the right to counsel. . . . Recognizing the difference between "forfeiture" and "waiver by conduct" is important. First, because of the drastic nature of the sanction, forfeiture would appear to require extremely dilatory conduct. On the other hand, a "waiver by conduct" could be based on conduct less severe than that sufficient to warrant a forfeiture. This makes sense since a "waiver by conduct" requires that a defendant be warned about the consequences of his conduct, including the risks of proceeding *pro se*. A defendant who engages in dilatory conduct having been warned that such conduct will be treated as a request to proceed pro se cannot complain that a court is "forfeiting" his right to counsel.

Goldberg at 1100-1101 (emphasis added) (citations omitted). We find *Goldberg's* analysis useful in determining that, on the facts of this case, the defendant cannot be said to have forfeited his right to counsel in the absence of any warning by the trial court both that he might be required to represent himself and of the consequences of this decision.

In reaching this conclusion, we have considered the State's arguments for a contrary result, some of which are not consistent with the trial transcript. On appeal, the State contends that at the outset of trial the trial court "found that Defendant had only fired Mr. Cloud so as to attempt to delay the trial," citing page twenty-seven of the transcript. In fact, at the start of the trial, the trial court did not express any opinion on defendant's motivation for seeking to continue the case and hire a different attorney. During the habitual felon phase, after defendant had been found guilty of the charge, the jury was sufficiently concerned about defendant's self-representation to send the trial court a note asking whether defendant had refused counsel. It was only at that point that the trial court expressed its opinion that defendant had hoped to delay the trial by replacing one attorney with another. The State also alleges several times in its appellate brief that the trial court made "specific findings about Defendant's forfeiture of his right to counsel," maintaining that "the trial court specifically found that Defendant's conduct in firing his lawyer to delay the trial forfeited his right to private counsel, thus requiring Defendant to proceed *pro se*" and urging that we "should affirm the trial court's finding that Defendant discharged his private counsel on the day of the trial to obstruct and delay his trial and thereby forfeited his right to counsel[.]" However, as defendant states in his reply brief, the "trial court never found that Mr. Blakeney forfeited his right to counsel[.] . . . Indeed, the word "forfeit" does not appear in the transcript of the trial proceedings."

There is no indication in the record that the trial court ruled that defendant forfeited the right to counsel by engaging in serious misconduct. Moreover, defendant was not warned that he might have to represent himself, and the trial court did not conduct the inquiry mandated by N.C. Gen. Stat. § 15A-1242, in order to ensure that defendant understood the implications of appearing *pro se*. In *State v. Bullock*, 316 N.C. 180, 340 S.E.2d 106 (1986), our Supreme Court addressed a factual situation similar both to the present case and to the "waiver by conduct" scenario discussed in *Goldberg*. In *Bullock*, the defendants' attorneys moved to withdraw shortly before trial, due to irreconcilable differences with the defendant. A few days later, defendant was in court and engaged in the following dialog with the trial court:

> Court: Mr. Bullock, I understand from Mr. Brown you wish to agree that Mr. C. C. Malone and Mr. Artis Plummer will no longer be your lawyers, is that correct?
>
> Defendant Bullock: That is so.
>
> Court: Now, they are employed by you, is that correct?
>
> Defendant Bullock: Yes, sir.
>
> Court: You understand that the Court is not going to appoint a lawyer for you?
>
> Defendant Bullock: Yes, sir.
>
> Court: Mr. Mason, when do you expect this case to be on the calendar?
>
> Ms. Scouten: It is already set next Monday.
>
> Court: I am not going to continue the case.
>
> Defendant Bullock: Yes, sir.
>
> Court: It will be for trial next Monday morning. You have a lawyer in here to go or be here yourself ready to go without a lawyer. Is that the way you understand it?
>
> Defendant Bullock: Yes, sir.
>
> Court: Going to be no continuance.
>
> Defendant Bullock: Yes, sir.

Bullock, 316 N.C. at 182-83, 340 S.E.2d at 107. We note that in *Bullock*, unlike the present case, the defendant was at least warned that he might

be required to proceed *pro se*. When the case was called for trial, the following dialog occurred:

> Court: Are you ready to proceed, Mr. Bullock?
>
> Mr. Bullock: I haven't been -- I haven't been able to find counsel to represent me, Your Honor.
>
> Court: Well, you had a lawyer.
>
> Mr. Bullock: After - after - on September the 4th to September the 10th, the counsels that I went to, they said they wouldn't have time enough for preparation.
>
> Court: Well, you had a lawyer, and it was your wish to get rid of him. And I let you get rid of him, but I told you at the time, if I'm not badly mistaken, that we would be trying your case on this date. Do you remember that?
>
> Mr. Bullock: Yes, sir.
>
> Court: You were fully aware of that when you consider -- consented to the withdrawal of your former lawyer.
>
> Mr. Bullock: (Nods affirmatively.)
>
> Court: All right. The case will be for trial.

Bullock at 184, 340 S.E.2d at 108. On appeal, our Supreme Court "agree[d] with the defendant that he is entitled to a new trial because the trial judge did not comply with N.C.G.S. § 15A-1242 before allowing the defendant to be tried without counsel":

> The defendant consented to the withdrawal of his retained counsel because of irreconcilable differences but stated that he would employ other counsel. On the day of the trial, he said that he had been unable to get any attorney to take his case because of the inadequate preparation time. The trial court reminded the defendant that he had warned him he would try the case as scheduled. The defendant acquiesced to trial without counsel because he had no other choice. Events here do not show a voluntary exercise of the defendant's free will to proceed *pro se*.

Bullock, 316 N.C. at 185, 340 S.E.2d at 108 (citing *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)). The Court in *Bullock* also cited *State v. McCrowre*, 312 N.C. 478, 322 S.E. 2d 775 (1984), noting that in that case the court "held that the defendant was entitled to a

new trial because the record did not show that the defendant intended to go to trial without the assistance of counsel and because the inquiry required by N.C.G.S. § 15A-1242 was not conducted." *Id* (emphasis added). *Bullock* appears to be functionally indistinguishable from the present case as regards the trial court's obligation to conduct the inquiry required by N.C. Gen. Stat. § 15A-1242.

For the reasons discussed above, we conclude that defendant neither voluntarily waived the right to be represented by counsel, nor engaged in such serious misconduct as to warrant forfeiture of the right to counsel without any warning by the trial court. As a result, the trial court was required to inform defendant that if he discharged his attorney but was unable to hire new counsel, he would then be required to represent himself. The trial court was further obligated to conduct the inquiry mandated by N.C. Gen. Stat. § 15A-1242, in order to ensure that defendant understood the consequences of self-representation. The trial court's failure to conduct either of these inquiries or discussions with defendant resulted in a violation of defendant's right under the Sixth Amendment to be represented by counsel, and requires a new trial.

REVERSED AND REMANDED.

Judges BRYANT concurs in the result.

Judge CALABRIA concurs.

STATE v. BOWLIN

[245 N.C. App. 469 (2016)]

STATE OF NORTH CAROLINA, PLAINTIFF
v.
DANIEL LYNN BOWLIN, DEFENDANT

No. COA15-701

Filed 16 February 2016

1. Sentencing—felony—discretion—within mandatory parameters

Although felony sentencing is subject to statutory minimum sentences for a given prior record level and class of offense, the trial court retains significant discretion to consider the factual circumstances of the case, including the defendant's age, in fashioning an appropriate sentence within the mandatory parameters.

2. Sentencing—wrong offense—sexual offense against child rather than first-degree sexual offense

Defendant was erroneously sentenced for the wrong offense and the case was remanded for resentencing where defendant was convicted of three charges of first-degree sexual offense in violation of N.C.G.S. § 14-27.4(a)(1) but was sentenced for three counts of sexual offense against a child by an adult in violation of N.C.G.S. § 14-27.4A.

3. Constitutional Law—cruel and unusual punishment—fifteen-year-old—tried as adult

Where defendant was tried as an adult on charges of first-degree sexual offense for events that occurred when he was fifteen years old, defendant did not show a violation of his constitutional rights where he did not establish that his sentence was so grossly disproportionate as to violate the Eighth Amendment to the United States Constitution.

Appeal by defendant from judgment entered 6 November 2014 by Judge W. David Lee in Rowan County Superior Court. Heard in the Court of Appeals 16 December 2015.

Attorney General Roy Cooper, by Assistant Attorney General Anne M. Middleton, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for defendant-appellant.

ZACHARY, Judge.

Daniel Bowlin (defendant) appeals from judgment entered upon his conviction of three counts of first degree sexual offense in violation of N.C. Gen. Stat. § 14-27.4(a)(1). Defendant was fifteen years old when he committed these offenses, for which he was tried as an adult when he was twenty-two. On appeal defendant argues that subjecting him to the mandatory minimum terms of imprisonment applicable to adult offenders was a violation of his rights under the North Carolina Constitution and United States Constitution to due process of law[1] and to be free of cruel and unusual punishment, because defendant was a minor when he committed the offenses. Defendant also argues, and the State agrees, that the trial court erroneously sentenced him for conviction of three counts of sexual offense against a child by an adult in violation of N.C. Gen. Stat. § 14-27.4A, when he was actually convicted of three charges of first degree sexual offense in violation of N.C. Gen. Stat. § 14-27.4(a)(1). We conclude that defendant has not shown a violation of his constitutional rights, but remand for a new sentencing hearing and correction of the judgment.

I. Background

In 2005, when defendant was fifteen years old, he lived for several months with a family who had two daughters, R.O. and G.O.[2] In 2012, when defendant was twenty-two and G.O. was thirteen, G.O. revealed that defendant had sexually abused her during the time defendant lived with G.O.'s family, when G.O. was six years old. G.O.'s family reported G.O.'s disclosure to the Rowan County District Attorney's Office, and on 16 October 2012, defendant was interviewed by Rowan County Detective Sarah Benfield. After being informed of his *Miranda* rights, defendant gave a statement admitting that during the time defendant lived with G.O.'s family, he performed oral sex on G.O. twice and put his finger in her vagina at least once. Thereafter, juvenile petitions were filed, charging defendant with three first degree sex offenses. On 10 January 2013, an order was entered transferring the charges to Superior Court, and on 11 February 2013, defendant was indicted for three counts of first degree sexual offense against a child in violation of N.C. Gen. Stat. § 14-27.4(a)(1).

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1. Defendant asserts generally that the application of adult sentencing requirements to him violated his right to due process. Defendant has not, however, advanced any argument addressing the issue of due process, and instead focuses his appellate arguments on issues pertaining to his rights under the Eighth Amendment.

2. To protect the privacy of the minor, we refer to her by the initials G.O.

On 3 October 2014, defendant filed a motion to dismiss the charges against him on the grounds that prosecution of defendant as an adult for offenses committed when he was fifteen years old violated defendant's rights to due process and to be free of cruel and unusual punishment. The trial court denied defendant's motion at a pretrial hearing.

The charges against defendant were tried at the 5 November 2014 criminal session of Rowan County Superior Court. G.O., who was sixteen years old at the time of trial, testified that when defendant lived with her family in 2005, defendant had performed oral sex on her on several occasions and placed his finger in her vagina on at least one occasion. Detective Benfield testified that in October 2012 she and another law enforcement officer interviewed defendant, and that after defendant was advised of his rights, he gave a statement admitting to the charged offenses. Defendant's statement was introduced into evidence and read to the jury. Defendant did not present evidence.

On 6 November 2014, the jury returned verdicts finding defendant guilty of three counts of first degree sex offense against a child. At a sentencing hearing the trial court determined that defendant was a prior level III offender. Defendant's counsel informed the trial court that defendant was convicted of first degree burglary when he was sixteen years old and had served a prison sentence until the fall of 2012. Defendant earned a G.E.D. degree while in prison and upon his release from custody, defendant obtained employment, fathered a child, and committed no other criminal offenses. Defendant's counsel asked the court to consolidate the offenses for sentencing and to impose a sentence in the mitigated range. The trial court found the existence of two mitigating factors: that defendant had a support system in the community, and that he acknowledged wrongdoing at an early stage of the proceedings. The trial court consolidated the offenses and imposed a sentence in the mitigated range of 202 to 252 months imprisonment. The trial court also ordered that upon defendant's release from prison, he would be subject to lifetime registration as a sex offender and lifetime satellite-based monitoring.

Defendant gave notice of appeal from his convictions in open court. On 8 September 2015, defendant filed a petition for writ of *certiorari* seeking review of the sex offender registration and satellite-based monitoring provisions of defendant's sentence. We granted defendant's motion on 23 September 2015.

II. Sentencing Errors

[1] On appeal defendant argues that the trial court erroneously sentenced him for three counts of commission of sexual offense by an adult against a child in violation of N.C. Gen. Stat. § 14-27.4A, although he was not convicted of this offense, but of first degree sexual offense, a violation of N.C. Gen. Stat. § 14-27.4(a)(1)(2013). A defendant who is convicted of first degree sexual offense is not necessarily subject to lifetime registration as a sex offender, but can petition to discontinue the registration after ten years. In addition, the trial court may not order satellite-based monitoring for conviction of this offense unless the trial court finds, based upon a risk assessment performed pursuant to N.C. Gen. Stat. § 14-208.40A (2013), that the defendant requires the highest degree of supervision. *State v. Treadway*, 208 N.C. App. 286, 702 S.E.2d 335 (2010), *disc. review denied*, 365 N.C. 195, 710 S.E.2d 35 (2011). Defendant and the State agree that this Court should remand this case for a new sentencing hearing. We conclude that the parties are correct and that defendant is entitled to a new sentencing hearing.

III. Mandatory Sentencing Requirements

Because defendant was prosecuted as an adult, he was subject to the statutes governing sentencing of adults. Defendant argues that these mandatory sentencing requirements violated his constitutional rights to due process and to be free of cruel and unusual punishment, on the grounds that the mandatory adult sentencing requirements did not allow the trial court to impose a sentence that took into account his youth and immaturity when he committed these offenses at the age of fifteen. We conclude that defendant has failed to establish a violation of his constitutional rights.

A. Constitutional Principles

"When constitutional rights are implicated, the appropriate standard of review is *de novo*." *In re Adoption of S.D.W.*, 367 N.C. 386, 391, 758 S.E.2d 374, 378 (2014) (citation omitted). The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Defendant cites three recent United States Supreme Court cases which addressed the scope of the Eighth Amendment in the context of sentences imposed on defendants who were under eighteen years old when they committed the offenses for which they were sentenced. In these cases the Court considered the characteristics of adolescents and held that it violates the Eighth Amendment to impose the harshest possible sentences - the death penalty, mandatory life in prison without the possibility of parole for

homicide, or life without parole for nonhomicide offenses - upon defendants who were under eighteen when the offenses were committed.

In the first of these cases, *Roper v. Simmons*, 543 U.S. 551, 555-56, 125 S. Ct. 1183, 1187, 161 L. Ed. 2d 1 (2005), the United States Supreme Court addressed the question of "whether it is permissible under the Eighth and Fourteenth Amendments to the Constitution of the United States to execute a juvenile offender who was older than 15 but younger than 18 when he committed a capital crime." The Court concluded that "the death penalty is disproportionate punishment for offenders under 18[.]" *Roper*, 543 U.S. at 575, 125 S. Ct. at 1198, 161 L. Ed. 2d at __. In reaching this conclusion, the Court considered the "comparative immaturity and irresponsibility of juveniles," the susceptibility of minors to negative influences and peer pressure, and the fact that the "personality traits of juveniles are more transitory." *Roper*, 543 U.S. at 569-70, 125 S. Ct. at 1195, 161 L. Ed. 2d at __. *Roper* thus established a categorical bar on the execution of defendants who committed homicide between the ages of fifteen and eighteen, regardless of the specific circumstances of the case.

In the next case, *Graham v. Florida*, 560 U.S. 48, 52-53, 130 S. Ct. 2011, 2017-18, 176 L. Ed. 2d 825 (2010), the Supreme Court considered "whether the Constitution permits a juvenile offender to be sentenced to life in prison without parole for a nonhomicide crime." The Court noted that its previous opinions interpreting the Eighth Amendment fell "within two general classifications. The first involves challenges to the length of term-of-years sentences given all the circumstances in a particular case. The second comprises cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty." *Graham*, 560 U.S. at 59, 130 S. Ct. at 2021, 176 L. Ed. 2d at __. *Graham* represented the first occasion for the Court to contemplate a categorical challenge to a term of years sentence, rather than to the imposition of the death penalty. The Court remarked upon the immaturity of juvenile offenders as well as the severity of a sentence of life without parole, and held "that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole." *Graham*, 560 U.S. at 74, 130 S. Ct. at 2030, 176 L. Ed. 2d at __.

In the third case, *Miller v. Alabama*, __ U.S. __, __, 132 S. Ct. 2455, 2460, 183 L. Ed. 2d 407, __ (2012), the Supreme Court held "that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " The Court noted that its "decision does not categorically bar [this] penalty . . . [but] mandates only that a sentencer

follow a certain process - considering an offender's youth and attendant characteristics - before imposing" a sentence of life without parole. *Miller* __ U.S. at __ , 132 S. Ct. at 2471, 183 L. Ed. 2d at __.

B. Statutes Governing Defendant's Sentence

[2] Defendant contends that the statutes on which his sentence was based did not permit the trial court to impose a sentence that included consideration of defendant's youth and immaturity at the time defendant committed these offenses. Accordingly, we review the statutes that governed the sentence imposed on defendant. N.C. Gen. Stat. § 7B-2200 (2013) provides that, after notice, a hearing, and a finding of probable cause, a trial court may "transfer jurisdiction over a juvenile to superior court if the juvenile was 13 years of age or older at the time the juvenile allegedly committed an offense that would be a felony if committed by an adult." In this case, defendant was fifteen years old when he committed these offenses and the trial court transferred jurisdiction to superior court, where defendant was prosecuted as an adult.

Sentencing of adults who are convicted of felony offenses is governed by Article 81B of Chapter 15A of the General Statutes, N.C. Gen. Stat. § 15A-1340.10 (2013) *et. seq*. The sentence that a defendant receives under Chapter 81B is the product of several factors, including a defendant's prior criminal record, the offense for which he or she is sentenced, and the factual circumstances of the case. N.C. Gen. Stat. § 15A-1340.14 (2013) provides the criteria for determining a defendant's prior record level, ranging from Level I to Level V. In this case, defendant's prior criminal history made him a Level III for sentencing purposes. In addition, felony offenses are categorized into classes ranging from the most serious, Class A, to the least serious, Class I. Defendant was convicted of three counts of first degree sexual offense in violation of N.C. Gen. Stat. § 14-27.4(a)(1), which is a Class B1 felony, the second most serious class. N.C. Gen. Stat. § 15A-1340.17(c) (2013) specifies the mandatory minimum sentences for specific prior record levels and classes of offenses, and provides that upon conviction of a Class B1 felony by an adult defendant who is a Level III offender, the trial court may not impose a probationary sentence, but must sentence the defendant to a minimum term of imprisonment between 190 and 397 months. The following is a chart of the permissible minimum sentences for a Level III offender who is convicted of a Class B1 felony:

Ranges in Months	Minimum Sentence
Aggravated Range	317 - 397 months

Presumptive Range	254-317 months
Mitigated Range	190-254 months

The trial court exercises its discretion in determining the appropriate minimum sentence within this range, based upon the jury's determination of the existence of aggravating factors and the trial court's finding of mitigating factors. N.C. Gen. Stat. § 15A-1340.16 (2013) lists more than forty statutory aggravating and mitigating circumstances, and also permits consideration of any other factor reasonably related to the purposes of sentencing. N.C. Gen. Stat. § 15A-1340.16(e)(4) lists as a statutory mitigating factor a finding that "[t]he defendant's age, immaturity, or limited mental capacity at the time of commission of the offense significantly reduced the defendant's culpability for the offense." In addition to consideration of aggravating and mitigating factors, the trial court has discretion to order that multiple sentences be served either concurrently or consecutively. We conclude that although felony sentencing is subject to statutory minimum sentences for a given prior record level and class of offense, the trial court retains significant discretion to consider the factual circumstances of the case, including the defendant's age, in fashioning an appropriate sentence within the mandatory parameters.

In this case, no aggravating factors were submitted to the jury, and the trial court found the existence of two mitigating factors, that the defendant had a strong support system in the community, and that defendant admitted his guilt at an early stage of the proceedings. Because the trial court found the existence of at least one mitigating factor, it had authority under N.C. Gen. Stat. § 15A-1340.16(b) to impose a minimum sentence in the mitigated range. The trial court imposed a minimum sentence of 202 months, which is close to the lowest permissible sentence in the mitigated range, and which has a corresponding maximum sentence of 252 months. The trial court also ordered that the three sentences be served concurrently. In addition to a term of imprisonment, defendant is also subject to mandatory registration as a sex offender, and to the possibility of satellite-based monitoring if a risk assessment conducted pursuant to N.C. Gen. Stat. § 14-208.40(a)(2) indicates that satellite-based monitoring is necessary.

C. Discussion

[3] We first address the nature of defendant's challenge to the constitutionality of his sentence. Defendant does not contend that the transfer of a juvenile defendant to superior court for prosecution as an adult is always unconstitutional, regardless of the factual circumstances of the

case. Nor does defendant assert that it is categorically unconstitutional for a juvenile offender whose case is transferred to superior court to be subject to mandatory minimum sentences. In this regard we note that a defendant who is a Level I or II offender or who is convicted of a felony in Class I through E may be eligible for a probationary sentence or a term of imprisonment of less than twelve months. Finally, defendant does not argue that the sentencing range for a Level III offender convicted of the Class B1 felony of first degree sexual offense is categorically unconstitutional, regardless of the factual circumstances of the assault, if imposed on a defendant who was fifteen years old at the time he committed the offenses. We conclude that defendant has not brought the type of categorical challenge at issue in cases such as *Roper* and *Graham*, in which the Supreme Court was asked to decide whether a particular punishment could ever be imposed upon a defendant who was a juvenile when the offense was committed.

Defendant instead argues that his sentence was unconstitutional because, upon being tried as an adult, he was subject to "serious adult penalties" and mandatory "harsh punishment" that did not allow the trial court to impose a probationary sentence, or to impose a sentence below the statutory minimum, based upon consideration of his youth and immaturity at the time he committed the offenses. Defendant is thus challenging the proportionality of the sentence he received under the mandatory sentencing provisions of Chapter 81B in the context of the fact that he committed these offenses when he was fifteen years old.

"Embodied in the Constitution's ban on cruel and unusual punishments is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.' " *Graham v. Florida*, 560 U.S. 48, 48, 130 S. Ct. 2011, 2021, 176 L. Ed. 2d 825, 835 (2010) (quoting *Weems v. United States*, 217 U.S. 349, 367, 30 S. Ct. 544, 54 L. Ed. 793 (1910)). In *Graham*, the United States Supreme Court discussed the process by which the Court reviews "challenges to the length of term-of-years sentences given all the circumstances in a particular case." *Graham*, 560 U.S. at 59, 130 S. Ct. at 2021, 176 L. Ed. 2d at __. The Court explained that when faced with such challenges, "the Court has considered all the circumstances to determine whether the length of a term-of-years sentence is unconstitutionally excessive for a particular defendant's crime." *Id.* The Court explained:

> A leading case is *Harmelin v. Michigan*, 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991). . . . The controlling opinion in *Harmelin* explained its approach for determining whether a sentence for a term of years is grossly

> disproportionate for a particular defendant's crime. A court must begin by comparing the gravity of the offense and the severity of the sentence. "[I]n the rare case in which [this] threshold comparison . . . leads to an inference of gross disproportionality" the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions. If this comparative analysis "validate[s] an initial judgment that [the] sentence is grossly disproportionate," the sentence is cruel and unusual.

Id. at 60, 130 S. Ct. at 2021, 176 L. Ed. 2d at 836 (quoting *Harmelin*, 501 U.S., at 1005, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (opinion of Kennedy, J.)). *Graham* has been followed in North Carolina. For example, in *State v. Whitehead*, 365 N.C. 444, 448, 722 S.E.2d 492, 496 (2012), our Supreme Court held that "a comparison of the gravity of defendant's offense . . . with the severity of his sentence, . . . leads to no inference of gross disproportionality" and stated that *Graham* "instruct[ed] that this comparison is a threshold consideration that must be met before comparing a defendant's sentence to the sentences of others for similar offenses."

In this case, defendant has not established that his is one of "the rare case[s] in which [the] threshold comparison . . . leads to an inference of gross disproportionality." Defendant contends generally that his constitutional rights were violated by the fact that the trial court could not impose a probationary sentence or a shorter term of imprisonment. Defendant does not, however, argue that the sentence he received of 202 to 254 months was a grossly disproportionate punishment for the commission of three first degree sexual offenses against a young child. Thus, defendant has not advanced an argument that his sentence was unconstitutional under *Graham*, the approach that has been followed in North Carolina, *see State v. Stubbs*, __ N.C. App. __, 754 S.E.2d 174 (2014). *aff'd*, 368 N.C. 40, 770 S.E.2d 74 (2015). We also note that the trial court exercised its discretion to consolidate the offenses and to sentence defendant in the mitigated range, but chose not to find the mitigating factor in N.C. Gen. Stat. § 15A-1340.16(e)(4), that "[t]he defendant's age, immaturity, or limited mental capacity at the time of commission of the offense significantly reduced the defendant's culpability for the offense." We conclude that defendant has failed to establish that his sentence of 202 to 254 months for three counts of sexual offense against a six year old child was so grossly disproportionate as to violate the Eight Amendment to the United States Constitution. We further conclude that

defendant was erroneously sentenced for the wrong offense and accordingly remand the case for resentencing.

NO ERROR IN PART, REVERSED AND REMANDED IN PART.

Judges CALABRIA and ELMORE concur.

STATE OF NORTH CAROLINA
v.
ANFERNEE MAURICE COLLINS

No. COA15-659

Filed 16 February 2016

1. Jurisdiction—subject matter—span of indictments—defendant's sixteenth birthday—offenses committed before birthday

The superior court did not have subject matter jurisdiction over a prosecution for three of four first-degree rapes of a child where the indictments alleged a time span of months, during which defendant had his sixteenth birthday, and there was no evidence that defendant was sixteen when the three offenses were committed. The district court has exclusive, original jurisdiction over cases involving juveniles alleged to be delinquent.

2. Jurisdiction—subject matter—span of indictments—defendant's sixteenth birthday—offense committed after birthday

The superior court had subject matter jurisdiction over a prosecution for one of four indictments for first-degree rape of a child where the indictments alleged that the rapes occurred over a span of months that included defendant's sixteenth birthday and unchallenged evidence showed that the offense occurred after defendant's sixteenth birthday. The fact that the range of dates alleged for the offenses included periods of time when defendant was not yet sixteen years old did not establish a lack of subject matter jurisdiction.

Judge STROUD concurring in part and dissenting in part.

Appeal by defendant from judgment entered 14 August 2014 by Judge Wayland J. Sermons, Jr. in Beaufort County Superior Court. Heard in the Court of Appeals 19 November 2015.

Attorney General Roy Cooper, by Assistant Attorney General Alexandra Gruber, for the State.

The Phillips Black Project, by John R. Mills, for defendant-appellant.

TYSON, Judge.

Anfernee Maurice Collins ("Defendant") appeals from judgments entered following his conviction of four counts of first-degree rape of a child. We vacate three of Defendant's four convictions and arrest the judgments for those three convictions for lack of jurisdiction, find no error on the fourth conviction, and remand for resentencing and rehearing on the imposition of lifetime satellite-based monitoring.

I. Background

A.B. testified to four acts of sexual intercourse, which occurred between her and Defendant in 2011. On 8 April 2013, Defendant was indicted in two separate documents for four counts of first-degree rape of a child. All four charges were stated in identical language and two counts were alleged in each indictment. According to the indictments, the four offenses allegedly occurred between "January 1, 2011 and November 30, 2011." The jury convicted Defendant of all four offenses. The offenses were consolidated and Defendant was sentenced to two consecutive terms of 192 to 240 months in prison. Upon release from prison, Defendant was also ordered to be subject to satellite-based monitoring for the remainder of his natural life.

A. First Incident

A.B. was fourteen years old when she testified at trial in 2014. She testified the first incident of sexual intercourse occurred in the spring or summer of 2011, while she was a student in the fourth grade. A.B. told the investigating officer the incident occurred "towards the end of the school year. [She] advised that it was summer time."

A.B.'s grandmother had dropped A.B. off at her aunt's house. When she arrived, Defendant and his mother were both in the home. A.B. fell asleep on the couch. Her aunt, Defendant's mother, left the home to go to work. When A.B. awoke, she and Defendant began talking. Defendant asked A.B. what sports she liked to play, and A.B. told Defendant she liked to play basketball at the local recreational center. Defendant told her to be careful about walking to the center alone. A.B. responded, "whatever," and walked to the refrigerator to get a drink.

Defendant told A.B. "not to talk to him like that," grabbed A.B. by the arm, and pulled her into his bedroom. Defendant pushed A.B. onto the bed and forced himself onto her despite her requests to stop. A.B. testified that Defendant held her down, pulled her pants and his pants down, and "put his private area in [her] private area." Afterward, A.B. testified Defendant stated "not to tell anybody and he was going to kill everybody [she] knew."

B. Second Incident

The second incident occurred on a day when A.B. was visiting at a friend's house. She developed a serious headache and called her grandmother. Her grandmother was unable to pick her up and told her to walk four or five houses down the street to her aunt's house. Defendant was present at the house when A.B. arrived. A.B. went into her aunt's bedroom alone to lay down and watch television. Defendant entered the bedroom about ten minutes later. A.B. tried to leave the room, but Defendant blocked her way. He held her down on the bed, pulled up her skirt, and forcibly engaged in sexual intercourse with her.

A.B. testified she was not sure exactly when the second incident occurred. The following exchange occurred during direct examination of A.B.:

> Q: Do you remember when that was? Was it still in the fourth grade?
>
> A: Yes, sir.
>
> Q: If you are not sure it's okay. Make sure.
>
> A: I'm not really sure.

The investigating officer testified A.B. told him the second incident had occurred "during the first semester of her fifth grade year."

C. Third Incident

A.B. also did not recall when in 2011 the third incident occurred. A.B. testified she was at her aunt's house and Defendant gave her a pill. She took the pill and did not remember anything until she woke up while Defendant was "having sex" with her. A.B. was "drowsy, sleepy," and Defendant was "inside her" for "a couple of minutes." After the incident, A.B. "just put [her] clothes back on and went back to sleep."

D. Fourth Incident

The final incident occurred "around Thanksgiving" of 2011. A.B. was alone at her aunt's house when Defendant came in the back door. He

pushed her down on the couch, kissed her on the mouth, and stated he was "going to go away for a while." Defendant then pulled down A.B.'s pants and engaged in intercourse with her.

Over a year later, in November of 2012, A.B. told her stepmother she had been raped by Defendant. On the same day, A.B.'s stepmother took her to speak with a law enforcement officer. Defendant was seventeen years old when he was arrested on 21 December 2012.

E. Defendant's Age

Defendant's arrest warrants erroneously stated his date of birth as 14 September 1994. According to the uncontroverted evidence presented by both the State and Defendant, Defendant was born on 14 September 1995. He turned sixteen years old on 14 September 2011. Defendant would have been either fifteen or sixteen years old during the relevant time period between 1 January 2011 and 30 November 2011, when A.B. alleged all the offenses occurred, and as is alleged in both indictments.

Defense counsel moved to dismiss all charges at the close of the State's evidence "based on the fact that the State has not proved beyond a reasonable doubt that [Defendant] committed these various acts that he's charged with."

The following exchange occurred:

> THE COURT: . . . And the Defendant's date of birth that is in evidence?
>
> PROSECUTOR: That is in evidence is September 14th 1995.
>
> . . . .
>
> THE COURT: So during the year 2011, 2012, the victim would be 11 and 12 years old?
>
> PROSECUTOR: Yes. The incidents all occurred before her – either before her birthday in 2011, which would make her 10 years old or 11 years old at the time of the incidents.
>
> THE COURT: So they all allegedly occurred in 2011?
>
> PROSECUTOR: Yes, sir.
>
> THE COURT: And the Defendant's date of birth of 9/14/95 would have made him, in 2011, 17 or 18 years old?
>
> PROSECUTOR: Seventeen.

> THE COURT: Seventeen? So the victim, according to the State's evidence, would be less than 13?
>
> PROSECUTOR: Yes, sir.
>
> THE COURT: The Defendant was at least 12 years old?
>
> PROSECUTOR: Yes, sir.
>
> THE COURT: And he was at least four years older than the victim?
>
> PROSECUTOR: Correct.

Neither party corrected the mathematical error in calculating Defendant's age as fifteen years old until he reached his sixteenth birthday on 14 September 2011. Defendant has filed a motion for appropriate relief (MAR) in this Court. A copy of Defendant's birth certificate, attesting his date of birth as 14 September 1995, is attached to Defendant's MAR.

II. Issues

Defendant argues: (1) the State failed to meet its burden to prove the existence of subject matter jurisdiction for the first three offenses; (2) the indictments were insufficient to establish subject matter jurisdiction for any count, after the indictments failed to allege dates specific enough to show Defendant was at least sixteen years old at the time the alleged offenses occurred; and, (3) this case should be remanded to the trial court for a hearing on the reasonableness of lifetime satellite-based monitoring in light of *Grady v. North Carolina*, __ U.S. __, 191 L. Ed. 2d 459 (2015).

Defendant also argues his MAR should be granted where: (1) the superior court lacked jurisdiction over the counts during which Defendant was less than sixteen years old at the time of the offenses; (2) trial counsel was prejudicially ineffective for failing to move to dismiss three of the charges at the close of the State's evidence, after the State failed to provide any substantial evidence tending to show Defendant was at least sixteen years old at the time of the offense; and, (3) trial counsel was ineffective and prejudiced Defendant for failing to request a special verdict on those three charges.

III. Subject Matter Jurisdiction

A. Standard of Review

"Whether a trial court has subject-matter jurisdiction is a question of law, reviewed *de novo* on appeal." *State v. Herman*, 221 N.C. App.

204, 209, 726 S.E.2d 863, 866 (2012). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment." *In re Appeal of the Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (citing *Mann Media, Inc. v. Randolph Cnty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002)). "A court empowered to hear a case *de novo* is vested with full power to determine the issues and rights of all parties involved, and to try the case as if the suit had been filed originally in that court." *Caswell County v. Hanks*, 120 N.C. App. 489, 491, 462 S.E.2d 841, 843 (1995) (citation and internal quotation marks omitted).

B. Defendant's Age on the Dates of the Offenses

[1] Defendant argues the superior court was without subject matter jurisdiction on the first three offenses, because no evidence presented at trial showed Defendant was at least sixteen years old at the time those offenses were committed. We agree.

The district courts have "*exclusive*, original jurisdiction over any case involving a juvenile who is alleged to be delinquent. For purposes of determining jurisdiction, the age of the juvenile *at the time of the alleged offense* governs." N.C. Gen. Stat. § 7B-1601(a) (2013) (emphasis supplied). "If, however, a juvenile commits a criminal offense on or after the juvenile's 16th birthday, the juvenile is subject to prosecution as an adult in superior court." *State v. Pettigrew*, 204 N.C. App. 248, 257, 693 S.E.2d 698, 704 (citing N.C. Gen. Stat. § 7B-1604), *appeal dismissed*, 364 N.C. 439, 706 S.E.2d 467 (2010).

The Juvenile Code, contained in the North Carolina General Statutes, provides the exclusive procedure under which a juvenile may be tried for criminal acts in superior court:

> After notice, hearing, and a finding of probable cause the court may, upon motion of the prosecutor or the juvenile's attorney or upon its own motion, transfer jurisdiction over a juvenile to superior court if the juvenile was 13 years of age or older at the time the juvenile allegedly committed an offense that would be a felony if committed by an adult. If the alleged felony constitutes a Class A felony and the court finds probable cause, the court *shall* transfer the case to the superior court for trial as in the case of adults.

N.C. Gen. Stat. § 7B-2200 (2013) (emphasis supplied).

"The superior court may obtain subject matter jurisdiction over a juvenile case *only if* it is transferred from the district court according to

the procedure this statute prescribes." *State v. Dellinger*, 343 N.C. 93, 96, 468 S.E.2d 218, 220 (1996) (emphasis supplied). The superior court does not have original jurisdiction over a defendant who was fifteen years old on the date of the alleged offense. *Id.*

In *Dellinger*, the Supreme Court held both the district court and the superior court had lost jurisdiction over the accused where he was twelve or thirteen years old on the date of offense, and who turned eighteen while his appeal from superior court was pending. *Id.* The uncontroverted evidence before us shows Defendant was born on 14 September 1995 and attained the age of sixteen years old on 14 September 2011.

"[W]hen jurisdiction is challenged . . . the State must carry the burden and show beyond a reasonable doubt that [the court] has jurisdiction to try the accused." *State v. Batdorf*, 293 N.C. 486, 494, 238 S.E.2d 497, 502-03 (1977). The State conceded during oral argument, and we agree with Defendant and the State that the evidence showed Defendant was fifteen years old at the time of the first offense. "When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority." *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981). We vacate Defendant's conviction for the first offense.

With regard to the second incident, A.B. first testified that it occurred while she was in the fourth grade and then stated she was "not really sure" when it occurred. According to the investigating officer, A.B. told him the second incident occurred after the first semester of her fifth grade year had begun. The officer's testimony was not offered as substantive evidence, but to corroborate and not contradict A.B.'s testimony. *See State v. Stills*, 310 N.C. 410, 415, 312 S.E.2d 443, 447 (1984) ("By definition, a prior statement is admitted only as corroboration of the substantive witness and is not itself to be received as substantive evidence.").

A.B. also could not recall when the third rape occurred, or whether it was before or after school resumed. Whether the second and third rape offenses occurred while Defendant was fifteen or sixteen years old cannot be determined from the evidence. Even if Defendant had moved for a special verdict, no substantive evidence was presented from which a jury could find beyond a reasonable doubt that Defendant was sixteen years old at the time of the commission of either the second or third offenses. *Batdorf*, 293 N.C. at 493, 238 S.E.2d at 502. The judgments entered on Defendant's second and third convictions must also be vacated for lack of subject matter jurisdiction in the superior court.

We need not more specifically address the issue in Defendant's MAR of whether trial counsel was ineffective and prejudiced Defendant for failure to request a special verdict on three of the four charges, or to preserve a claim that the State failed to present sufficient evidence that the superior court had jurisdiction over Defendant on those charges. "Subject matter jurisdiction cannot be conferred upon a court by consent, waiver or estoppel, and failure to demur or object to the jurisdiction is immaterial." *Stark v. Ratashara*, 177 N.C. App. 449, 451-52, 628 S.E.2d 471, 473 (2006). Trial counsel's failure to move to dismiss the charges based on a lack of subject matter jurisdiction does not preclude this Court from reviewing the issues *de novo* and determining whether subject matter jurisdiction exists. *Id.*

C. Sufficiency of the Indictments

[2] Defendant argues the indictments were facially insufficient to establish subject matter jurisdiction in the superior court where they: (1) cover a period of time when Defendant was a juvenile; (2) fail to allege the dates of the offenses with sufficient specificity; and, (3) state the same range of offense dates for all four charges. We disagree.

We address this issue only with regard to Defendant's fourth conviction, which A.B. testified occurred around Thanksgiving of 2011, as Defendant's other three convictions are vacated. "A challenge to the facial validity of an indictment may be brought at any time, and need not be raised at trial for preservation on appeal." *State v. LePage*, 204 N.C. App. 37, 49, 693 S.E.2d 157, 165 (2010). Defendant was tried and convicted on two bills of indictment in File Nos. 12 CRS 52879 and 12 CRS 52880. Except for the docket numbers, each indictment is identical and charges two identical counts of first degree rape of a child. The date of offense on the indictments is alleged as "January 1, 2011 to November 30, 2011."

As discussed above, Defendant must have attained at least sixteen years of age at the time the offenses occurred for the superior court to have jurisdiction over him. N.C. Gen. Stat. §§ 7B-1601(a), 7B-1604. It is uncontested Defendant turned sixteen years old on 14 September 2011.

Defendant was fifteen years old and a juvenile from 1 January 2011 until 13 September 2011, the majority of the time period alleged on the indictments. The superior court would have jurisdiction to enter judgment against Defendant only for offenses, which occurred from his sixteenth birthday on 14 September 2011 until 30 November 2011.

An indictment must assert "facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient

precision clearly to apprise the defendant . . . of the conduct which is the subject of the accusation." N.C. Gen. Stat. § 15A-924(a)(5) (2013). The purpose of the indictment is to put the defendant on "notice of the charge against him so that he may prepare his defense and be in a position to plead prior jeopardy if he is again brought to trial for the same offense." *State v. Freeman*, 314 N.C. 432, 435, 333 S.E.2d 743, 745 (1985). "Generally, an indictment must include a designated date or period within which the offense occurred." *State v. Everett*, 328 N.C. 72, 75, 399 S.E.2d 305, 306 (1991).

In cases of sexual assaults on children, our Supreme Court has relaxed the temporal specificity requisites which must be alleged to support the indictment:

> We have stated repeatedly that in the interests of justice and recognizing that young children cannot be expected to be exact regarding times and dates, a child's uncertainty as to time or date upon which the offense charged was committed goes to the weight rather than the admissibility of the evidence. *Nonsuit may not be allowed on the ground that the State's evidence fails to fix any definite time for the offense where there is sufficient evidence that defendant committed each essential act of the offense.*

State v. Wood, 311 N.C. 739, 742, 319 S.E.2d 247, 249 (1984) (citations omitted) (emphasis supplied).

Here, the indictments alleged a period of time which includes from 14 September 2011 to 30 November 2011 when Defendant was sixteen years old and clearly under the jurisdiction of the superior court. The dissenting opinion does not dispute that substantial evidence presented at trial showed one of the four offenses occurred "around Thanksgiving," and within the time period alleged on the indictment after Defendant turned sixteen years old.

The district court was without jurisdiction over the fourth offense where the uncontroverted evidence shows it occurred "around Thanksgiving," after Defendant had turned sixteen years old the previous September. N.C. Gen. Stat. § 7B-1601(a) (The district court has "exclusive, original jurisdiction over any case involving a juvenile who is alleged to be delinquent. For purposes of determining jurisdiction, the age of the juvenile at the time of the alleged offense governs."). Only the superior court had jurisdiction over this offense. *Pettigrew*, 204 N.C. App. at 257, 693 S.E.2d at 704.

Under the dissenting opinion's rationale, the superior court is without jurisdiction if the defendant is fifteen years old *at any time* within the alleged range of offense dates, even if the evidence shows the crime clearly occurred when the defendant was sixteen years old. This rationale is contrary to our Supreme Court's stated purpose for the relaxed temporal specificity requisites to allow allegations in indictments charging crimes of sexual assaults on children. *Wood*, 311 N.C. at 742, 319 S.E.2d at 249.

A defendant may request a special verdict to require the jury to find the crime occurred after he was sixteen years old. *See State v. Blackwell*, 361 N.C. 41, 46-47, 638 S.E.2d 452, 456 (2006), *cert. denied*, 550 U.S. 948, 167 L. Ed. 2d 1114 (2007) ("A special verdict is a common law procedural device by which the jury may answer specific questions posed by the trial judge that are separate and distinct from the general verdict."). Likewise, a defendant may move for a bill of particulars if he is seeking more specificity on the allegations in the indictment. N.C. Gen. Stat. § 15A-925 (2013); *State v. Johnson*, 30 N.C. App. 376, 377, 226 S.E.2d 876, 878, *cert. denied*, 291 N.C. 177, 229 S.E.2d 691 (1976) ("The purpose of a bill of particulars is to give an accused notice of the specific charge or charges against him and to apprise him of the particular transactions which are to be brought in question on the trial.").

The fact that the range of dates alleged for the offenses includes periods of time when Defendant was not yet sixteen years old, but also alleges a period of time after Defendant was sixteen years old, does not establish a lack of subject matter jurisdiction to vacate Defendant's fourth conviction for rape of a child. This Court may vacate one count of an indictment, while upholding the valid remaining counts contained therein. *See*, *e.g.*, *State v. Williams*, __ N.C. App. __, __, 774 S.E.2d 880, 886-87 (2015) (vacating one count of PWIMSD on the indictment as fatally defective and upholding a second count). Even if this Court adopted the rationale and conclusion in the dissenting opinion, the State would not be barred from obtaining a new indictment charging only the crime, which occurred after Defendant's sixteenth birthday. We hold jurisdiction clearly exists in superior court and there is no error in Defendant's fourth conviction by the jury for first-degree rape of a child. This argument is overruled.

D. Disposition

The appropriate disposition is to remand for resentencing on the fourth charge. *See State v. Brown*, 350 N.C. 193, 213, 513 S.E.2d 57, 69-70 (1999) (This Court "cannot assume that the trial court's consideration of

[the vacated convictions] had no affect [sic] on the sentence imposed."). As part of Defendant's resentencing, the trial court shall also conduct a new hearing on whether the imposition of lifetime satellite-based monitoring is consistent with *Grady*, __ U.S. __,191 L. Ed. 2d 459 (2015) (North Carolina's satellite-based monitoring program effects a Fourth Amendment search, and "[t]he reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations.").

IV. Conclusion

The State concedes the superior court's lack of jurisdiction over the first conviction. No evidence shows Defendant was sixteen years old, and the superior court was without subject matter jurisdiction to enter judgment on the first three of Defendant's four convictions.

The judgment entered on the two convictions in File No. 12 CRS 52879 is vacated. The conviction for Count I of the indictment in File No. 12 CRS 52880 and the judgment entered thereon is vacated.

The indictments lawfully allege a range of dates during which the offenses occurred, including periods of time when Defendant was an adult, and are not facially defective. The indictments allege a period of time when Defendant was sixteen years old and was lawfully subject to the jurisdiction of the superior court.

Unchallenged evidence shows the fourth offense occurred around Thanksgiving 2011 and after Defendant's sixteenth birthday on 14 September 2011. We find no error regarding the jury's verdict convicting Defendant of Count II of File No. 12 CRS 52880. Defendant's MAR alleging ineffective assistance of counsel is dismissed for reasons stated in this opinion.

This case is remanded to the superior court for a resentencing hearing on Count II of File No. 12 CRS 52880 for the jury's conviction finding Defendant to be guilty of first-degree rape of a child. The trial court shall also conduct a new hearing on the imposition of lifetime satellite-based monitoring.

VACATED IN PART, NO ERROR IN PART, DISMISSED IN PART, AND REMANDED FOR RESENTENCING AND REHEARING ON LIFETIME SATELLITE-BASED MONITORING.

Judge DIETZ concurs.

Judge STROUD concurs in part and dissents in part in a separate opinion.

STROUD, Judge, concurring in part and dissenting in part.

I concur with the majority in vacating three of Defendant's convictions, but I dissent because I believe that all four indictments failed to confer jurisdiction upon the superior court.

The evidence against Defendant is disturbing and compelling, and he has been found guilty of raping a child four times. Any reasonable person would want him punished and removed from society so that he may not have an opportunity to hurt another child in any way. But this is just the sort of case in which "we must bear in mind Lord Campbell's caution: 'Hard cases must not make bad laws.' " *Shearin v. Lloyd*, 246 N.C. 363, 371, 98 S.E.2d 508, 514 (1957) (quoting *Mast v. Sapp*, 140 N.C. 533, 545, 53 S.E. 350, 354 (1906)). I believe that the superior court did not have jurisdiction over Defendant under any of the four indictments as written because of the error as to Defendant's correct date of birth and because Defendant was under the age of 16 during over 75% of the time period alleged.

This is a unique case in which a defendant was charged as an adult based upon a mistake as to his age. We do not know the origin of the mistake as to Defendant's age on the arrest warrants. Perhaps it was a mere typographical error, or perhaps the date was listed incorrectly on another document and the error was not discovered when the magistrate was preparing the arrest warrants. Inexplicably, no one—defense counsel, the trial court, or anyone else in the courtroom—realized this basic mathematical error until after Defendant had been arrested as an adult, indicted as an adult, imprisoned as an adult pending trial for nearly two years, tried as an adult, and convicted as an adult felon for at least three crimes (and maybe four) which he committed under the age of 16. Only on appeal did Defendant's counsel realize the error as to Defendant's age. As noted by the majority opinion, it is undisputed that Defendant was either 15 or 16 years old when all of the alleged criminal acts were committed, with only the fourth offense arguably occurring after his sixteenth birthday.[1] At the very least, it is a travesty of justice

1. The briefs and majority refer to the offense which occurred last as the "fourth" offense or indictment, and I also will call them the "fourth" for convenience and consistency. All four indictments are identical and were issued simultaneously and based upon the indictments, there is no way to distinguish between the alleged offenses. Only the evidence makes this distinction.

that a juvenile was arrested on 21 December 2012 for offenses he committed under the age of 16 and has been treated as an adult defendant ever since, and no one noticed it until his convictions were appealed.

This oversight is even more baffling since the crime charged includes as elements both the age of the victim and the age of the offender. N.C. Gen. Stat. § 14-27.2(a)(1), under which Defendant was charged and convicted, defines the crime of first-degree rape as follows:

> A person is guilty of rape in the first degree if the person engages in vaginal intercourse:
>
> (1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim[.]

N.C. Gen. Stat. § 14-27.2(a)(1) (2011).

The arrest warrants listed Defendant's birthday incorrectly; the later indictments did not mention Defendant's birthday or age but merely recited the statutory language above. It is undisputed that the victim was under 13 and the defendant was at least four years older than her during the entire time period alleged in the indictments.

The State argues that there is no jurisdictional requirement that a criminal indictment of an adult must include the defendant's date of birth or age, and this is true. *See* N.C. Gen. Stat. § 15A-924 (2013). Criminal indictments of adults and juvenile petitions[2] are alike in many ways, and one of the similarities is that both require essentially the same specificity in the description of the alleged criminal offense. *See In re J.F.*, ___ N.C. App. ___, ___, 766 S.E.2d 341, 345 (2014) ("The sufficiency of a juvenile petition is evaluated by the same standards applied to indictments in adult criminal proceedings. The general rule is that an indictment charging a statutory sexual offense will be sufficient if it is couched in the language of the statute.") (citations and quotation marks omitted). In particular, indictments for sex offenses against children may properly encompass a period of time and need not allege a specific date of each offense. *See State v. Everett*, 328 N.C. 72, 75, 399 S.E.2d 305, 306 (1991). Defendant was actually under the age of 16 during over 75% of the time period alleged for all four indicted offenses, and there is no way to determine which offense is which based on the four identical indictments.

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2. "The pleading in a juvenile action is the petition. The process in a juvenile action is the summons." N.C. Gen. Stat. § 7B-1801 (2013).

Certainly, the State could properly have filed juvenile petitions against Defendant for three offenses alleging a time period from 1 January 2011 until 13 September 2011, or the day before Defendant's sixteenth birthday, and an indictment for a fourth offense, alleging a time period from 14 September 2011 until 30 November 2011. Based upon Defendant's actual age and evidence presented, the district court would have had jurisdiction over the juvenile petitions, and the superior court would have had jurisdiction over the indictment. *See* N.C. Gen. Stat. § 7B-1604(a) (2013) ("Any juvenile . . . who commits a criminal offense on or after the juvenile's sixteenth birthday is subject to prosecution as an adult."). Perhaps the district court would have transferred the three juvenile matters to superior court to be tried with the fourth offense. *See* N.C. Gen. Stat. § 7B-2200 (2013) ("[T]he court *may* . . . transfer jurisdiction over a juvenile to superior court if the juvenile was 13 years of age or older at the time the juvenile allegedly committed an offense that would be a felony if committed by an adult.") (emphasis added). But none of this happened because of a mathematical error.

Except for the mistake as to Defendant's date of birth, Defendant would have been treated as a juvenile and—unlike an indictment—a juvenile petition for delinquency must include an allegation of the juvenile's age:

> The petition shall contain the name, *date of birth*, and address of the juvenile and the name and last known address of the juvenile's parent, guardian, or custodian. *The petition shall allege the facts that invoke jurisdiction over the juvenile.* The petition shall not contain information on more than one juvenile.
>
> A petition in which delinquency is alleged shall contain a plain and concise statement, without allegations of an evidentiary nature, asserting facts supporting every element of a criminal offense and the juvenile's commission thereof with sufficient precision clearly to apprise the juvenile of the conduct which is the subject of the allegation.
>
> Sufficient copies of the petition shall be prepared so that copies will be available for the juvenile, for each parent if living separate and apart, for the guardian or custodian if any, for the juvenile court counselor, for the prosecutor, and for any person determined by the court to be a necessary party.

N.C. Gen. Stat. § 7B-1802 (2013) (emphasis added).

The requirement that the petition include the juvenile's date of birth and "facts that invoke jurisdiction over the juvenile" is the relevant difference here between the jurisdictional requirements of a juvenile petition and an adult criminal indictment. *See id.* It is immediately apparent even in the statute regarding the petition that a juvenile under the age of 16 is treated differently than an adult or an older juvenile. For example, copies of the petition must be prepared for "each parent if living separate and apart, for the guardian or custodian if any, for the juvenile court counselor, for the prosecutor, and for any person determined by the court to be a necessary party." *Id.* A juvenile is afforded many different protections throughout the entire court process.[3] Without listing all of these differences, the most salient here is that the district court has "exclusive, original jurisdiction over any case involving a juvenile who is alleged to be delinquent" and has the discretion as to whether to transfer Defendant to superior court to be tried an adult. N.C. Gen. Stat. §§ 7B-1601(a), -2200 (2013).

N.C. Gen. Stat. § 7B-2203(b) sets out the factors to be considered in a transfer hearing:

> In the transfer hearing, the court shall determine whether the protection of the public and the needs of the juvenile will be served by transfer of the case to superior court and shall consider the following factors:
>
> (1) The age of the juvenile;
>
> (2) The maturity of the juvenile;
>
> (3) The intellectual functioning of the juvenile;
>
> (4) The prior record of the juvenile;
>
> (5) Prior attempts to rehabilitate the juvenile;
>
> (6) Facilities or programs available to the court prior to the expiration of the court's jurisdiction under this Subchapter and the likelihood that the juvenile would benefit from treatment or rehabilitative efforts;
>
> (7) Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner; and

3. *See generally* N.C. Gen. Stat. ch. 7B, arts. 17 to 27 (2013).

> (8) The seriousness of the offense and whether the protection of the public requires that the juvenile be prosecuted as an adult.

N.C. Gen. Stat. § 7B-2203(b) (2013). If the district court decides to transfer the case to superior court, the resulting "order of transfer *shall* specify the reasons for transfer." *Id.* § 7B-2203(c) (emphasis added). "The juvenile court must consider eight enumerated factors pursuant to a transfer hearing and then specify the reasons for transfer if the case is transferred to superior court." *In re E.S.*, 191 N.C. App. 568, 572, 663 S.E.2d 475, 478 (citation and brackets omitted), *disc. review denied*, 362 N.C. 681, 670 S.E.2d 231 (2008).

The transfer decision is in the discretion of the district court and is reviewable, by either the superior court or any appellate court, only for an abuse of discretion. *See id.* at 573, 663 S.E.2d at 478 ("[T]he decision to transfer a juvenile's case to superior court lies solely within the sound discretion of the juvenile court judge and is not subject to review absent a showing of gross abuse of discretion.") (citation omitted). Defendant never had the opportunity for a transfer hearing on any of the charges against him. We know nothing of his maturity, intellectual functioning, and other factors which the district court would have been required to consider, although the record surely contains hints that Defendant had significant intellectual and emotional challenges.

The assertion of jurisdiction over Defendant as an adult based upon a mistake as to his age is not a mere technicality; it is a jurisdictional error and irrevocably changed the course of his prosecution:

> The superior court may obtain subject matter jurisdiction over a juvenile case only if it is transferred from the district court according to the procedure [that N.C. Gen. Stat. § 7A-608 (1989), the predecessor of N.C. Gen. Stat. § 7B-2200,] prescribes. Contrary to the Court of Appeals' opinion and the State's arguments, the superior court cannot obtain jurisdiction by the mere passage of time nor can the mere passage of time transform a juvenile offense into an adult felony. A juvenile offender does not "age out" of district court jurisdiction and by default become subject to superior court jurisdiction upon turning eighteen. Because the district court never actually exercised jurisdiction here, that court could not and did not properly transfer the case to the superior court. Therefore, the superior court lacks subject matter jurisdiction.

> This interpretation both conforms to the plain language of these statutes and accords with legislative intent. In the Juvenile Code, the General Assembly enacted procedural protections for juvenile offenders with the aim that delinquent children might be rehabilitated and reformed and become useful, law-abiding citizens. These safeguards evince conceptual distinctions between the purpose of juvenile proceedings and that of adult criminal prosecutions. Further, had the legislature intended that the time of institution of proceedings should govern jurisdiction, the 1994 amendment lowering the age at which juveniles may be transferred to superior court for trial as adults would have been superfluous.

State v. Dellinger, 343 N.C. 93, 96, 468 S.E.2d 218, 220-21 (1996) (citation omitted).

The State argues that even if Defendant was under age 16 during much of the time alleged in the indictments, he was over 16 during some of the period alleged and was 18 by the time he was tried, so at least the fourth offense, which the evidence places in that time period, was properly in superior court. The majority relies on the lenity which our case law has afforded the State in allegations of dates in sex offense cases involving child victims. But neither the State nor the majority can cite to a case in which the time period alleged in an indictment covers a time during which a defendant would have been under 16, because there is no such case in North Carolina. Only one case alludes to this situation, where the defendant argued that the allegation that the offense occurred "on or about" a time period beginning about a week after his sixteenth birthday could possibly include events occurring before he turned sixteen, thus depriving the superior court of jurisdiction. *See State v. Pettigrew*, 204 N.C. App. 248, 256-57, 693 S.E.2d 698, 704, *appeal dismissed*, 364 N.C. 439, 706 S.E.2d 467 (2010). This Court implied that it would be error to include a time period before a defendant's sixteenth birthday in the indictment:

> Defendant next argues that his convictions must be vacated because the time period of the offenses alleged in the superseding indictment encompasses a time prior to Defendant's 16th birthday, and thus, the superior court lacked jurisdiction over this matter. . . .
>
> . . . .

> [T]he superseding indictment alleged that Defendant committed the charged offenses "on or about" 1 February 2001 through 20 November 2001. On 23 January 2001, Defendant turned 16 years old. Thus, Defendant contends that the "on or about" language in the superseding indictment could encompass acts committed before 23 January 2001, when Defendant was 15 years old.
>
> N.C. Gen. Stat. § 15A-924(a)(4) provides that an indictment must include "a statement or cross reference in each count indicating that the offense charged was committed on, or on or about, a designated date, or during a designated period of time." The "on or about" language is commonly used in indictments, and Defendant acknowledges that this language is usually sufficient for purposes of N.C. Gen. Stat. § 15A-924(a)(4).
>
> We are not persuaded by Defendant's argument. As we held above, there was substantial evidence that Defendant committed the charged offenses *within* the time frame alleged in the superseding indictment. *Defendant was 16 years old during that entire time frame.* Accordingly, Defendant's argument is without merit, and this assignment of error is overruled.

Id. at 256-58, 693 S.E.2d at 704 (emphasis added and brackets omitted). Although *Pettigrew* did not address the exact issue presented in this case, since that indictment's first alleged date was *after* the defendant's sixteenth birthday and "there was substantial evidence that Defendant committed the charged offenses" after his sixteenth birthday, I believe *Pettigrew* is instructive and tends to support the lack of jurisdiction. *See id.*, 693 S.E.2d at 704.

The majority cites *State v. Williams* for the proposition that "[t]his Court may vacate one count of an indictment while upholding the valid remaining counts contained therein." *See State v. Williams*, ___ N.C. App. ___, ___, 774 S.E.2d 880, 886-87 (2015). I agree that this general rule of law is true, but *Williams* is inapposite to the jurisdictional question at issue as the defendant there was an adult and there was no question of potential juvenile court jurisdiction. In *Williams*, the defendant was charged with two different crimes in one indictment. *Id.* at ___, 774 S.E.2d at 883. This Court held that the first count of the indictment was fatally defective because it failed to "allege the possession of a substance that falls within Schedule I" and the State's amendment

to the indictment was an impermissible "substantial alteration" so that the trial court lacked subject matter jurisdiction over the first count. *Id.* at ___, 774 S.E.2d at 885-86. But the remaining count of the indictment properly described a distinctly different crime, and the defendant's various challenges to that conviction were rejected. *Id.* at ___, 774 S.E.2d at 886-87. Here, the two indictments each included two counts of the same offense, described in the same way and occurring in the same time period. On the face of the indictments, there is no way to distinguish one count from another, and the time period covered by each is the same.

The State argued before this Court that as long as a defendant is 16 or older for at least part of the time period alleged in an indictment, the superior court has jurisdiction over him as an adult. I do not find any law that supports this claim and believe it is simply incompatible with our entire system of juvenile justice. The law treats juveniles under age 16 differently for many important reasons and grants the district court "exclusive, original jurisdiction" over these cases. *See* N.C. Gen. Stat. § 7B-1601(a). The State's position would allow the State to charge juveniles as adults, to arrest them as adults, to imprison them pending trial as adults, and to claim "no harm, no foul" when the error is pointed out if even just a small bit of the evidence against the defendant covers a time period after his sixteenth birthday. Even if Defendant was not prejudiced by being arrested, tried, and convicted as an adult, the superior court simply did not have jurisdiction over Defendant under the indictments as written. *Cf. Lee v. Gore*, 365 N.C. 227, 234, 717 S.E.2d 356, 361 (2011) ("Finally, to hold otherwise essentially adopts a 'no harm, no foul' analysis. Absent prejudice, so the argument goes, a statutory violation such as we have here may be overlooked. As we explain above, however, this case involves the [Division of Motor Vehicles'] authority to act. This is not a case that turns upon prejudice to the petitioner.").

For the reasons stated above, I believe all of Defendant's convictions must be vacated for lack of jurisdiction, so I dissent.

STATE v. DALE

[245 N.C. App. 497 (2016)]

STATE OF NORTH CAROLINA
v.
WENDY M. DALE

No. COA15-105

Filed 16 February 2016

1. Indictment and Information—disorderly conduct—language of charge—sufficient to give notice

In a case arising from an encounter between officers and a mother in the lobby of the jail after her son had been arrested and denied bail, the words in the document charging disorderly conduct in a public facility fit within the definition for the behavior described in N.C.G.S. § 14-132(a)(1) and were sufficient to confer jurisdiction. There is no practical difference between "curse and shout" and "rude or riotous noise." Either phrase provides the defendant more than adequate notice of what behavior is alleged to be the cause of the charges.

2. Criminal Law—pattern jury instruction—greater than necessary proof required from State—no plain error

In a prosecution for disorderly conduct in a public place, there was no plain error or prejudicial error where the trial court gave a pattern jury instruction that required that the State prove more than was statutorily required.

3. Constitutional Law—double jeopardy—resisting arrest—disorderly conduct

In a case arising from an encounter between officers and a mother in the lobby of the jail after her son had been arrested and denied bail, there was no double jeopardy in defendant being acquitted of resisting, delaying, or obstructing an officer but convicted of disorderly conduct in a public facility. The two offenses had different elements, and the proof of the disorderly conduct charge did not require any proof that the prohibited conduct obstructed or resisted an officer.

4. Constitutional Law—free speech—disorderly conduct

Although a defendant arrested for disorderly conduct in public facility argued that she had a First Amendment right to curse and shout in a public facility at officers who were in the process of jailing her son despite being warned that she was in the lobby of the jail and had to calm down, the case was controlled by *In Re Burrus*, 275 N.C. 517.

Judge INMAN concurs in result only.

Appeal by defendant from judgment entered 10 July 2014 by Judge Robert F. Johnson in Orange County Superior Court. Heard in the Court of Appeals 13 August 2015.

Attorney General Roy Cooper, by Assistant Attorney General Joseph L. Hyde, for the State.

Wendy Dale, pro se.

McCULLOUGH, Judge.

Wendy Dale ("defendant") appeals from a judgment entered upon a jury verdict finding her guilty of disorderly conduct in a public facility in violation of N.C. Gen. Stat. § 14-132(a)(1), for which she received a suspended sentence of 30 days and 12 months of supervised probation along with court costs and a community service fee. Defendant raises several issues on appeal including lack of subject matter jurisdiction due to a defective indictment, instructional error, double jeopardy, and, by a motion for appropriate relief (MAR) filed during the pendency of this appeal, facial and as applied challenges to the constitutionality of N.C. Gen. Stat. § 14-132(a)(1). After a careful consideration of each of defendant's arguments, we find no error and uphold her conviction.

I. Procedural Background

Defendant was tried before a jury and convicted of disorderly conduct in a public building on 10 July 2015. Although defendant was represented by counsel at trial, she has pursued her appeal and post-conviction proceedings *pro se*.[1]

1. It appears that defendant based her purported notice of appeal on a previous version of N.C. Gen. Stat. § 15A-1448(a)(4), which, until repealed in 1987, provided: "If there has been no ruling by the trial judge on a motion for appropriate relief within 10 days after motion for such relief has been made, the motion shall be deemed denied." *See* 1997 N.C. Sess. Laws Ch. 1147 S. 29, repealed by 1987 N.C. Sess. Laws Ch. 624. Since it was repealed, that provision is of no legal effect. We note that defendant, representing herself *pro se* in her post-conviction filings with the trial court and on appeal, also has violated Rule 28 of the North Carolina Rules of Appellate Procedure by submitting her brief in single-spaced, rather than double-spaced, text. *See* N.C. R. App. P. 28(j)(2)(A). Although the Rules of Appellate Procedure apply equally to all parties, "whether acting *pro se* or being represented by all of the five largest law firms in the state," *Bledsoe v. County of Wilkes*, 135 N.C. App. 124, 125, 519 S.E.2d 316, 317 (1999), this nonjurisdictional defect is not "gross" or "substantial" enough to warrant sanctions. *See Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transport Co., Inc.*, 362 N.C. 191, 199, 657 S.E.2d 361, 366 (2008).

Defendant timely appealed from the judgment entered on her conviction to this Court on 24 July 2014. On that same date, defendant filed her first motion for appropriate relief (the "Initial MAR") with the trial court pursuant to N.C. Gen. Stat. § 15A-1414. The Initial MAR alleged that defendant was arrested without probable cause and convicted without sufficient evidence of the offense charged, disorderly conduct in a public building. The Initial MAR also alleged that the trial court erred in refusing to instruct the jurors on defendant's First Amendment right to free speech.

Based on an erroneous calculation of the filing deadline, on 11 September 2014, the trial court determined the Initial MAR was untimely and entered an order denying the Initial MAR without a hearing on the merits (the "First Order"). On 26 September 2014, defendant filed a motion to vacate the First Order. The trial court entered an order vacating the First Order on 19 November 2014.

On 3 October 2014, while defendant's motion to vacate the First Order was pending before the trial court, defendant filed an amended motion for appropriate relief (the "Amended MAR") as allowed by N.C. Gen. Stat. § 15A-1415(g). The Amended MAR alleged errors within the scope of N.C. Gen. Stat. § 15A-1415 including that N.C. Gen. Stat. § 14-132(a)(1), the disorderly conduct statute defendant was convicted of violating, is unconstitutionally overbroad. This argument was not included in defendant's Initial MAR.

On 10 December 2014, the trial court entered an order denying appropriate relief (the "Second Order") based on its review of "the Motion," a trial transcript, and other materials in the record. The Second Order does not define the term "the Motion" or otherwise reference the Initial MAR or the Amended MAR, but it appears from the content of the Second Order that the trial court addressed only the issues raised in the Initial MAR. The Second Order does not determine the merits of the claims added by defendant in the Amended MAR, including the claim that N.C. Gen. Stat. § 14-132(a)(1) is unconstitutional. Accordingly, it appears that the trial court never determined the merits of defendant's Amended MAR.

The record for defendant's appeal to this Court was settled on 26 January 2015 by the expiration of the time allowed for the State to serve defendant with notice of its approval of the proposed record or with an alternative proposed record.

On 3 August 2015, defendant filed a MAR in this Court (the "Appellate MAR"). In the Appellate MAR, defendant makes the same constitutional

claims as she did to the trial court in the Amended MAR. Because the record on appeal has been settled, defendant's Appellate MAR is properly before this Court.

Although this Court ordered that a copy of the Appellate MAR and the State's response be forwarded to the trial court, those pleadings, through inadvertence, were not forwarded. The complex procedural history of this case, along with missing portions of the record, may explain the trial court's order stating that it was a "bit baffled as to what evidence or proceedings the Court of Appeals wanted" the trial court to consider on remand.

On 30 November 2015, the trial court proceeded with a hearing in an effort to comply with this Court's remand order. The trial court conducted a hearing, but neither defendant nor the State offered any evidence. The trial court made findings of fact regarding defendant's objections during trial and concluded as a matter of law that defendant raised state and federal constitutional claims at trial.

The trial court has not determined the merits of the constitutional claims in defendant's Amended MAR. Those claims, which are also raised in defendant's Appellate MAR, involve only issues of law and are now addressed in this opinion.

II. Factual Background

On 25 September 2012, defendant's seventeen-year-old son was arrested by Officer Joseph Glenn with the Carrboro Police Department ("CPD") upon a warrant charging him with failure to appear. While at the CPD, defendant's son called defendant, at which time Officer Glenn informed defendant that her son was being arrested and taken before a magistrate. At that time, defendant became irate and Officer Glenn informed defendant that she could speak to the magistrate.

Officer Glenn then transported defendant's son to the magistrate's office, a courtroom, where the magistrate on duty set bond. When defendant's son was unable to post bond, a process Officer Glenn explained to defendant during a second call by defendant's son to defendant upon arrival at the Orange County Jail, Officer Glenn began the jail admittance process.

At the time of defendant's arrival at the facility, Officer Glenn was standing with defendant's son in the lobby of the jail, immediately outside of the magistrate's courtroom. When defendant came through the door visibly upset, Officer Glenn asked defendant if she was the mother.

Defendant then replied, "Yes, I'm his F-ing mother." Defendant was then informed that her son was going to be admitted to the jail because he was unable to post bond. At that point defendant stated, "No, he's coming home with me." When Officer Glenn once again said that her son could not post bond, defendant screamed, "No, you're going to give me my son now." These events transpired in the jail lobby in front of the magistrate's courtroom.

Upon hearing defendant's loud scream, Corporal Danotric Nash with the Hillsborough Police Department, along with Officer Jason Winn, responded to the area where defendant was yelling at Officer Glenn and said, "Ma'am, you have to calm down, this is the lobby of the jail." Defendant continued yelling, at which time Corporal Nash advised her to step outside and walked her toward the door. When Corporal Nash went to close the door, defendant resisted, banging loudly on the closed door twice. Defendant stopped banging on the door when Corporal Nash informed her she would be charged if she continued banging on the door or if she damaged any property.

Corporal Nash then observed defendant talking on her cell phone and, after she hung up, stated to defendant, "Ma'am, if you calm down, if you just go speak to the magistrate. Or, your friend that you was on the phone with, or a Judge, maybe he'll undo the bond." Defendant replied, "Shut the F up talking to me, shut the F up talking to me." Defendant was then advised to leave and directed to the parking lot by Corporal Nash. According to Corporal Nash, defendant then grabbed him, scratching the left side of his face behind his ear, causing him to bleed. Corporal Nash and Officer Winn then arrested defendant. At trial, defendant testified that she thought Corporal Nash was going to grab her so she put up her hands in a defensive movement, thereby making contact with Corporal Nash's face.

Defendant was acquitted on the charge of assaulting an officer but convicted of disorderly conduct in a public facility.

III. Discussion

A. Sufficiency of Charging Document

[1] The facts of this case show that defendant, upset that her son was being arrested, engaged in abusive conduct toward two officers who were in the lobby of the jail while her son was being processed into the jail. The statute under which defendant was charged makes it a misdemeanor for any person to "[m]ake any rude or riotous noise, or be guilty of any disorderly conduct, in or near any public building

or facility[.]"[2] N.C. Gen. Stat. § 14-132(a)(1) (2013). The charging document does not use the words "rude or riotous noise" but instead states that the defendant did unlawfully "curse and shout" at police officers in the jail lobby.

Without a valid warrant or indictment, a court lacks jurisdiction to proceed. Challenges to the validity of an indictment may be raised at any stage in the proceedings and we review the challenge *de novo*. *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409 (2009). In a misdemeanor case the charging document may be a statement of charges instead of an indictment. *See* N.C. Gen. Stat. § 15A-922 (2013). Whether by statement of charges or by indictment, the charging document shall require:

> [a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

N.C. Gen. Stat. § 15A–924(a)(5) (2013).

An indictment has been held to be sufficient "if it charges the offense in a plain, intelligible and explicit manner[.]" *State v. Taylor*, 280 N.C. 273, 276, 185 S.E. 2d 677, 680 (1972). This Court recently described the requirements of a valid indictment, which apply equally to a statement of charges, as follows:

> Pursuant to N.C. Gen. Stat. § 15A-924(a)(5) (2013), a valid indictment must contain "[a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation." An indictment "is sufficient in form for all intents and purposes if it expresses the charge against the defendant in a plain, intelligible, and explicit manner." N.C. Gen. Stat. § 15–153 (2013). "[T]he purpose of an indictment . . . is to inform a party so that he may learn with reasonable certainty the nature of the crime of

2. Defendant does not contest the fact that the lobby of a jail is a public facility.

> which he is accused[.]" *State v. Coker*, 312 N.C. 432, 437, 323 S.E.2d 343, 347 (1984). The trial court need not subject the indictment to "hyper technical scrutiny with respect to form." *In re S.R.S.*, 180 N.C. App. 151, 153, 636 S.E.2d 277, 280 (2006). "The general rule in this State and elsewhere is that an indictment for a statutory offense is sufficient, if the offense is charged in the words of the statute, either literally or substantially, or in equivalent words." *State v. Greer*, 238 N.C. 325, 328, 77 S.E.2d 917, 920 (1953).

State v. Simpson, __ N.C. App. __, __, 763 S.E.2d 1, 3 (2014).

As stated earlier, defendant was tried upon a statement of charges (AOC Form–CR-120) drafted by the Assistant District Attorney which alleged:

> I, the undersigned, upon information and belief allege that on or about the date of offense shown and in the county named above, the defendant named above did unlawfully and willfully curse and shout at the officers J. Glenn of the Carrboro Police Department and officer D. Nash of the Hillsborough Police Department while inside the lobby of the Orange County Jail[.]

The statement of charges also references N.C. Gen. Stat. § 14-132(a)(1), which provides that "[i]t is a misdemeanor if any person shall . . . [m]ake any rude or riotous noise, or be guilty of any disorderly conduct, in or near any public building or facility[.]" N.C. Gen. Stat. § 14-132(a)(1) (2013).

It is difficult to discern from defendant's brief exactly what she complains of with regard to the notice required in a charging document as she seems to merge her arguments regarding the jury instructions with her argument as to the sufficiency of the notice provided by the statement of charges.

While the statement of charges does not use the phrase "rude or riotous noise" and instead charges that defendant did "curse and shout" at the officers while in the lobby of the jail, even defendant acknowledges that this satisfied the first prong of the elements of the offense. In her brief, defendant properly states the elements of the offense of which she has been convicted stating: "Accordingly, from the language of the statute, the elements of this crime are: First, that the defendant made a rude or riotous noise or is guilty of disorderly conduct; and second, that such rude or riotous noise or disorderly conduct occurred in or

near a public building or facility." Defendant then goes on to acknowledge that "curse and shout" are equivalent to making a "rude or riotous noise" when she states: "The concise allegation in the Warrant and Misdemeanor Statement of Charges that I 'cursed and shouted' in the lobby of the jail may very well support the 'rude or riotous noise' prong of the first element of Disorderly Conduct in a Public Building pursuant to N.C. Gen Stat. § 14-132(a)(1)[.]"

We agree the charging document in this case was sufficient because it charged the offense in N.C. Gen. Stat. § 14-132(a)(1) "in the words of the statute, either literally or substantially, or in equivalent words." *Simpson*, __ N.C. App. at __, 763 S.E.2d at 3. There is no practical difference between "curse and shout" and "rude or riotous noise." Either phrase provides the defendant more than adequate notice of what behavior is alleged to be the cause of the charges. In other cases our courts have found common sense definitions proper when upholding indictments. For instance, in *State v. Cockerham*, this Court held an indictment charging a defendant with discharging a firearm into an occupied property was not defective where the indictment read "that dwelling known as apartment 'D-1', located at 2733 Wake Forest Highway, Durham, North Carolina. . . ." 155 N.C. App. 729, 735, 574 S.E.2d, 694, 698 (2003). The word "apartment" does not appear in the statute, which instead lists "building, structure . . . or enclosure." N.C. Gen. Stat. § 14-34.1(a) (2013). Thus, we have held that words in an indictment or other charging document which fit within the definition of the words in a statute sufficiently describe the crime charged so as to provide the court with jurisdiction. In other words, we properly interpret charging documents when we utilize normal definitions of the words in the document, even if they are not the exact same words as in the statute. This notice pleading has replaced the use of "magic words" and allows for a less exacting standard, so long as the defendant is properly advised of the charge against him or her.

In analyzing the phrase "rude and riotous noise" in N.C. Gen. Stat. § 14-132(a)(1), we note the ordinary definitions. "Rude" is defined as "ill-mannered; discourteous." *The American Heritage Dictionary*, 1076 (Second College Edition 1985). Is not a person who is cursing and shouting acting in an ill-mannered, discourteous way? The same dictionary defines "riot" as "an unrestrained outbreak, as of laughter or passions" and "riotous" as "boisterous." *Id.* at 1064. When one is shouting curses at another person, are they not engaged in an unrestrained outbreak of passion? Our Supreme Court has long believed so. *See State v. Horne*, 115 N.C. 739, 740-41, 20 S.E. 443, 443 (1894).

The words in the charging document in this case fit within the definition for the behavior described in the statute and are thus sufficient to confer jurisdiction so that the trial could proceed. Thus, defendant's claim that the statement of charges is defective is overruled.

B. Instructional Error

[2] Defendant next argues that the trial court committed instructional error by giving pattern jury instruction N.C.P.I. – Crim. 236A.31 (1999). The court instructed the jury as follows:

> Now, the Defendant, Wendy Dale, has been charged with disorderly conduct. For you to find the Defendant, Wendy Dale, guilty of this offense, the State must prove four things beyond a reasonable doubt.
>
> First, that the Defendant, Wendy Dale, willfully and without justification or excuse, made or used an utterance, gesture or abusive language.
>
> Secondly, that such utterance, gesture or abusive language was intended and plainly likely to provoke a violent retaliation, and thereby cause a breach of the peace.
>
> Third, that such utterance, gesture or abusive language was a public disturbance. A public disturbance is an annoying, disturbing or alarming act or condition occurring in a public place that is beyond what would normally be tolerated in that place at that time. The Orange County jail lobby is a public place.
>
> And fourth, that such public disturbance was intentionally caused by the Defendant, Wendy Dale.
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date, September 25th, 2012, the Defendant, Wendy Dale, willfully and intentionally, without justification or excuse, made or used an utterance, gesture or abusive language that was intended and plainly likely to provoke violent retaliation, and thereby caused a breach of the peace, and that such utterance, gesture or abusive language was a public disturbance, it would be your duty to return a verdict of guilty.

At the conclusion of the charge, defendant's counsel made no suggestions for changes and did not object. Defendant now claims the error amounts to plain error because it is prejudicial.

This Court's review of jury instructions is limited to a review for plain error when the issues concerning the instructions are not preserved below. *See* N.C. R. App. P. 10(a)(4) (2015).

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice-that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations and quotation marks omitted).

In the instructions issued in this case, the trial court required the State to prove an element that was not required by the charging statute, that being the requirement that the "utterance, gesture or abusive language that was intended and plainly likely to provoke violent retaliation, and thereby caused a breach of the peace[.]" While defendant may argue that her statements were not likely to so provoke, that is an issue of fact to be resolved by the jury. When she challenged the authority of the court to order her son into detention and stated she was going to take him home, without regard to the court process and the requirements of bond, it was within the jury's prerogative to find otherwise.

Furthermore, as the State had to prove more than was required in order to obtain a conviction, there is no prejudice to defendant. *See State v. Farrar*, 361 N.C. 675, 679, 651 S.E.2d 865, 867 (2007) (such variance is not fatal when variance benefits the defendant). In *Farrar* our Supreme Court held "the trial court's charge to the jury . . . benefitted [the] defendant[ ] because the instructions required the State to prove more elements than those alleged in the indictment. Therefore, there was no prejudicial error in the instructions." *Id.*

Similarly in this case, it is clear defendant benefitted from the charge given, to which no objection was made. It is unlikely defendant would have been acquitted had the trial court instructed the jury by tracking the statute or had given the charge approved in *State v. Leyshon*, 209 N.C. App. 755, 710 S.E.2d 710, COA 10-556 (1 March 2011) (unpub.), *available* at 2011 WL 705140, *appeal dismissed*, 365 N.C. 203, 710 S.E.2d 52 (2011), an unpublished case cited in both parties' briefs. The instruction in *Leyshon* provided the jury the following guidance:

> [I]f you find from the evidence in this case and beyond a reasonable doubt that on or about the alleged date of July 14, 2008 that this Defendant did make a rude or riotous noise or engage in disorderly conduct within the Watauga County Courthouse. If you find each of those things beyond a reasonable doubt, then it would be your duty to return a verdict finding the Defendant guilty of Disorderly Conduct.

2011 WL 705140 at *4.

A simple comparison of the two instructions demonstrates the State had to prove much more to obtain a conviction in this case than was actually required. Thus, in accordance with *Farrar*, we hold the trial court did not commit prejudicial error, much less plain error, by giving the instruction now being contested. Defendant's argument is overruled.

C. Double Jeopardy

[3] Defendant next argues that because she was acquitted of resisting, delaying, or obstructing an officer in violation of N.C. Gen. Stat. § 14-223 (2013), she must be acquitted of the charge for which she was convicted, disorderly conduct in a public facility. Defendant asserts the argument as double jeopardy.

Double jeopardy is prohibited under both the U.S. Constitution and the North Carolina Constitution's "Law of the Land Clause." *See* U.S. Const. amend. V; *State v. Gardner*, 315 N.C. 444, 464, 340 S.E.2d 701, 714 (1986). A plea under former jeopardy fails unless it is grounded both in law and fact. If the two offenses contain elements which differ then the offense is not well grounded in law. *State v. McAllister*, 138 N.C. App. 252, 256, 530 S.E.2d 859, 862, *appeal dismissed*, 352 N.C. 681, 545 S.E.2d 724 (2000). To be well grounded in fact, the same evidence must support a conviction in both cases. *State v. Ray*, 97 N.C. App. 621, 623, 389 S.E.2d 422, 424 (1990). As can be readily seen from the previous discussion of the elements for the offense of disorderly conduct, the two offenses have different elements and the proof of the disorderly conduct charge does not require any proof that the prohibited conduct obstructed or resisted an officer. This argument is baseless and is overruled.

D. Constitutionality of N.C. Gen. Stat. § 14-132(a)(1)

[4] Defendant, in her Appellate MAR, contests the constitutionality of N.C. Gen. Stat. § 14-132(a)(1) both as enacted and as applied to her. In the Appellate MAR, defendant argues that she had a First Amendment right to curse and shout in a public facility at officers who were in the

process of jailing her son despite being warned that she was in the lobby of the jail and had to calm down. This Court is not going to engage in a lengthy discussion of the void for vagueness doctrine as our Supreme Court has already decided that the statute at issue here is not void for vagueness. *See In Re Burrus*, 275 N.C. 517, 532, 169 S.E.2d 879, 888 (1969), *aff'd sub nom.*, *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971). In that case the statute at issue provided that if a person "shall make any rude or riotous noise or be guilty of any disorderly conduct in any public building of any county, or shall commit any nuisance in such building, he shall be guilty of a misdemeanor[.]" *Id.* at 531, 169 S.E.2d at 888. Our Supreme Court went on to say:

> There is nothing vague or indefinite about these statutes. Men - even children - of common intelligence can comprehend what conduct is prohibited without overtaxing the intellect. Judges and juries should be able to interpret and apply them uniformly. There, as here, defendants argued that the statute was void because its prohibitions were uncertain, vague and indefinite. In upholding that statute, the court said: "It is difficult to believe that the defendants are as mystified as to the meaning of these ordinary English words as . . . they profess to be in their brief. Clearly, they have grossly underestimated the powers of comprehension possessed by 'men of common intelligence.' " That observation seems appropriate here.
>
> The Supreme Court of the United States in sustaining a conviction in the courts of New Jersey for a violation of an ordinance forbidding the use of sound trucks emitting "loud and raucous" sound, said: "The contention that the section is so vague, obscure and indefinite as to be unenforceable merits only a passing reference. This objection centers around the use of the words 'loud and raucous.' While these are abstract words, they have through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden." *Kovacs v. Cooper*, 336 U.S. 77, 93 L. Ed. 513, 69 S. Ct. 448, 10 A.L.R. 2d 608 (1949).

Id. at 532, 169 S.E.2d at 888-89 (internal citation omitted).

As our Supreme Court has found a statute that is virtually identical to the statute as the one now in force to be constitutional, this Court is bound to uphold the constitutionality of N.C. Gen. Stat. § 14-132 (a)(1).

In Re: Civil Penalty, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Defendant's argument that the statute is unconstitutional is thus overruled.

Defendant's argument that the statute as applied to her is unconstitutional also lacks merit. As we have found the statute to be constitutional, certainly her misbehavior in the lobby of the jail adjacent to the magistrate's courtroom violates its proscription of rude or riotous conduct in a public facility, or at the very least, raised a jury issue now resolved against defendant. This argument is also overruled.

IV. Conclusion

Having found that the statement of charges was not defective, that defendant's acquittal of resisting an officer in District Court did not prohibit her being tried for disorderly conduct in Superior Court, that the trial court did not commit prejudicial error in its jury instructions, and the statute in question is both constitutional upon its face and as applied, we find defendant's trial was conducted free of prejudicial error. Thus, we uphold her conviction.

NO ERROR

Judge STROUD concurs.

Judge INMAN concurs in result only.

STATE OF NORTH CAROLINA
v.
ANTONIO DELONTAY FORD

No. COA15-75

Filed 16 February 2016

1. Evidence—song posted on social media—performed by defendant—relative and probative

Where a man was killed by defendant's pit bull and defendant was charged with involuntary manslaughter, the trial court did not err by admitting a rap song recording from myspace.com in which defendant claimed that the victim was not killed by defendant's dog. The song was relevant and probative, outweighing any prejudicial effect. Further, in light of the overwhelming evidence of defendant's guilt, there was no reasonable possibility that, had the song not been admitted, a different result would have been reached at trial.

2. Evidence—authentication—screenshots of social media page—content distinctive and related to defendant

Where a man was killed by defendant's pit bull and defendant was charged with involuntary manslaughter, the trial court did not err by admitting two screenshots taken from myspace.com showing defendant and the pit bull. Strong circumstantial evidence existed that the webpage and its unique content belonged to defendant—the screenname matched defendant's nickname; there were pictures of defendant and his pit bull, DMX; and there were videos with captions such as "DMX tha Killer Pit." The content was distinctive and related to defendant and DMX, and it was directly related to the facts at issue.

3. Evidence—expert testimony—opinion as to cause of death—dog bites

Where a man was killed by defendant's pit bull and defendant was charged with involuntary manslaughter, it was not plain error for the trial court to allow a pathologist to opine that the victim's death was caused by dog bites. The pathologist gave his expert opinion on the victim's cause of death based on his autopsy of the body, including his observation of the bite marks on the body, and on his study of these types of cases.

Appeal by defendant from judgment entered 29 July 2014 by Judge W. Osmond Smith, III, in Person County Superior Court. Heard in the Court of Appeals 22 September 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General David L. Elliot, for the State.

Gilda C. Rodriguez for defendant-appellant.

BRYANT, Judge.

Where the admission of a "rap song" was not substantially more prejudicial than probative, we overrule defendant's argument that he is entitled to a new trial. The trial court's admission of "screenshots" from an internet website was not error. The admission of opinion testimony of an expert in forensic pathology, that the victim's injuries were caused by dog bites, was not in violation of Rules 702 or 704 and did not amount to plain error.

On 10 September 2012, a grand jury in Person County indicted defendant Antonio Delontay Ford on charges of involuntary manslaughter and obstruction of justice, in regard to the death of Eugene Cameron. The matter came on for trial on 23 July 2014 in Person County Superior Court, the Honorable W. Osmond Smith, III, Judge presiding.

The evidence presented at trial tended to show that on 27 May 2012, at 11:00 a.m., Deputy Adam Norris, of the Person County Sheriff's Department, responded to a residence located at 1189 Semora Road in Roxboro, based on a report of a possibly deceased person. At the residence, under a carport, Deputy Norris observed the body of an adult male, later identified as Eugene Cameron, lying face up in a pool of blood. The victim's clothes had been ripped off and there were "severe lacerations to the [victim's] inner right arm and the biceps [sic] area, between that and the triceps." Most of the blood appeared to have come from lacerations to the victim's inner biceps. Also, there were paw prints in the blood pool surrounding the body. The victim had no pulse, and the body exhibited partial rigidity.

Detective Michael Clark and other deputies with the Person County Sheriff's Department, also reported to the scene on 27 May 2012. Detective Clark spoke with the homeowner, John Paylor, by cell phone. When informed that the victim appeared to have been killed in a dog attack, Paylor suggested that Detective Clark look at the dog next door.

Detective Clark and other law enforcement officers walked to the next door residence and observed a "pretty heavy" chain around a light pole in the back yard. They spoke with defendant, who acknowledged owning a dog named DMX. DMX was removed from defendant's home and turned over to Animal Control. Dried blood, observed on areas of DMX's body including his chest and muzzle (mouth) area, was collected and samples sent for DNA testing. DNA samples were also taken from the victim's pants, shirt, belt, and cell phone case. DNA taken from punctured cloth from the victim's pants confirmed the presence of DMX's DNA.

During the course of the investigation it was revealed that DMX had been allowed to run freely in the neighborhood and that there had been at least three other dog-bite incidents involving DMX. Kennard Graves, who lived at 1253 Semora Road, testified that he was a life-long resident of Person County and that he had known defendant "all my life." Graves had been familiar with defendant's dog, DMX, for "[a]bout 6 or 7 years." Graves had five dogs of his own. Graves testified that he had observed DMX running loose in the neighborhood plenty of times, and in the month prior to Eugene Cameron's death, DMX had attacked one of Graves's dogs in Graves's backyard.

Tyleik Pipkin, who was 23 years old at the time of trial, testified that on 20 October 2007, he was talking with defendant, whom he knew by the nickname "Flex." Defendant was holding his dog, but the dog got loose. Pipkin and an acquintance ran and tried to hop on top of a car. When Pipkin fell off, defendant's dog tried to reach Pipkin's neck, and while they struggled, the dog bit Pipkin under his left bicep. Pipkin described the dog as "very aggressive." Pipkin identified the dog pictured in one of the State's exhibits (Exhibit 60) as looking like the same dog that attacked him. State's Exhibit 60 was a picture of DMX.

Michael Wix was employed with the Durham County Department of Animal Control. On 20 October 2007, he responded to a 9-1-1 call reporting multiple people on Piper Street bitten by a dog. Upon arrival, Officer Wix "met [defendant] there who at the time was trying to secure DMX, who was running loose on Piper Street." Defendant identified the dog as DMX, which Officer Wix noted was a red and white male pit bull. In his report on the incident, Officer Wix wrote that defendant had let his dog loose, the dog bit two people, after which defendant was able to capture the dog. But thirty minutes later, defendant's dog was again running loose on Piper Street. Officer Wix reported that defendant appeared to be intoxicated and that when Officer Wix informed

defendant that DMX would have to be quarantined, defendant became "very angry and aggressive."

John Paylor, Jr., the homeowner of the residence located at 1189 Semora Road where Eugene Cameron's body was found, testified that he had lived at that address for twelve years. Paylor, a Vietnam veteran, who had worked with the recreations department, had been a corrections officer, and recently retired from the Department of Transportation, testified that he and Cameron had been friends "most of my life." "We came up together through school[, high school and elementary]." Cameron would usually come to Paylor's house on Saturdays after male choral practice at church. On 26 May 2012, Paylor spoke with Cameron by cell phone at 5:16 p.m. Paylor was at Myrtle Beach, and Cameron was checking on Paylor's house. Paylor testified that under his carport was a table and chairs, and that it was common for him and Cameron to sit outside in the shade. Defendant was Paylor's next door neighbor, and Paylor was familiar with defendant and defendant's dog, DMX.

The night before trial began, Detective Clark discovered a webpage hosted by www.myspace.com, with the screen name Flexugod/7.[1] On the webpage, Detective Clark observed photos of defendant and videos of defendant's dog, DMX. Detective Clark captured a "screenshot" of a video link entitled "DMX the Killer Pit." The caption associated with the video stated "After a Short Fight, he killed that mut" [sic]; the description read, "Undefeated." The videos themselves were neither admitted into evidence nor played for the jury; however, "screenshots" of the video links were admitted into evidence and published to the jury. Detective Clark testified that the "screenshots" of the dog depicted in the videos was the same dog seized during the investigation. Detective Clark also discovered a song "posted [online] by [defendant] Antonio Ford" about the incident under investigation, the lyrics denying that the victim's death was caused by a dog. Over defendant's objection, the song was played for the jury. Detective Clark testified that he recognized the voice on the recording as defendant's. Paylor also recognized the song played for the jury. Paylor testified that defendant often played his music loudly, and Paylor had heard that song coming from defendant's residence.

The evidence also consisted of testimony from Dr. Samuel David Simmons, a forensic pathologist employed by the North Carolina Office of the Chief Medical Examiner at the time Eugene Cameron's body was autopsied. Dr. Simmons testified, without objection, to his forensic

1. In crime scene photos of defendant's residence, Detective Clark observed an award given to defendant that referred to him by the nickname "Flex."

examination and his opinion as to cause of death. He related his initial observations of the victim's body. "[A] lot of the clothing appeared to be torn and blood soaked. . . . He had a pair of blue jeans which were partially pulled down his legs." As to the victim's injuries, Dr. Simmons testified that "the pattern is consistent with animal bites. These would also be consistent with dog bites as well."

> Q. Based upon your, um, overall examination of Mr. Cameron and the various injuries he had, do you have an opinion as to which of those injuries would have been the fatal wound or fatal injury?
>
> A. [Mr. Cameron's right upper arm] is the area of fatal injury, and again from the complexity, it's hard to tell if this was just one single bite in this particular area or multiple bites in the same area, but there were multiple perforations of his brachial artery and the vein that accompanies that artery.

"The brachial artery is the main vessel that supplies blood down from your heart to your hand, essentially. So, all of the blood passes through your brachial artery." "My opinion is the cause of death is exsanguination due to dog bites."

Elizabeth Wictum was admitted without objection as an expert in nonhuman forensic science and DNA analysis. Wictum, the director of the forensic unit within the Veterinary and Genetics Lab at the University of California Davis, testified that she compared the DNA profiles obtained from the punctured area of the victim's pants with a swab taken from the dog. "I got an exact match." Wictum testified that, according to her calculations, the number of times this profile comes up in the dog population is about 1 in five quadrillion.

Jessica Posto, a forensic biologist working for the North Carolina State Crime Laboratory during the time of the investigation of the death of Eugene Cameron, was admitted to testify as an expert in the field of forensic science, including body fluid identification. Posto testified that she examined hair taken from the right side of the dog's belly, hair from under the dog's chest, hair from the left side of the dog's muzzle, and hair from the upper left side of the dog's neck. All four samples "revealed the presence for human blood." A forensic DNA analyst working in the biology section of the Raleigh Crime Lab testified that the DNA profile from Cameron's body matched the blood samples taken from DMX's fur.

At the conclusion of the evidence, the jury returned a guilty verdict against defendant on the charge of involuntary manslaughter both on

the basis of unlawfully allowing his dog, which was over six months old, to run at large, unaccompanied, in the nighttime, and of acting in a criminally negligent way. The jury found defendant not guilty of the charge of obstruction of justice. In accordance with the jury verdict, the trial court entered judgment against defendant on the charge of involuntary manslaughter, sentencing defendant to an active term of 15 to 27 months. Defendant appeals.

On appeal, defendant raises the following issues: the trial court (I) erred in admitting a "rap" song recording; (II) erred in admitting evidence taken from the internet; and (III) committed plain error in admitting opinion testimony.

I

[1] Defendant argues the trial court erred in admitting a "rap" song recording alleged to be defendant's. Defendant contends that the song was not relevant as it "did not have any tendency to make the existence of any fact that [was] of consequence to the determination of the action more probable or less probable" and further, was admitted in violation of Rule 403. We disagree.

Pursuant to North Carolina General Statutes, section 8C-1, Rule 402, "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly or by these rules. Evidence which is not relevant is not admissible." N.C. Gen. Stat. § 8C-1, Rule 402 (2013). " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.* § 8C-1, Rule 401 (2013). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.* § 8C-1, Rule 403 (2013). "[T]he term 'unfair prejudice' contemplates evidence having 'an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one.' " *State v. McDougald*, 336 N.C. 451, 457, 444 S.E.2d 211, 214 (1994) (citation omitted) (quoting N.C.G.S. § 8C-1, Rule 403 official commentary).

> Whether to exclude evidence under Rule 403 is a matter within the sound discretion of the trial court. This Court

> will find an abuse of discretion only upon a showing that the trial court's ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision.

State v. Jackson, ___ N.C. App. ___, ___, 761 S.E.2d 724, 732 (2014) (citation and brackets omitted).

> A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.

N.C. Gen. Stat. § 15A-1443(a) (2013).

Defendant moved to suppress admission of the song. However, his motion was denied, and the song was played during trial. Defendant now argues that the song, which contains profanity and racial epithets, served to offend and inflame the jury's passions and allowed them to "disregard holes in the State's case."

Defendant attempts to point to the "holes in the State's case" and minimize the State's evidence by contending that the evidence presented did not inextricably tie his dog to the death of the victim. Defendant points to what was lacking in the testimony (e.g., no blood on DMX's paws, no paw prints or impressions leading to defendant's residence, and the difference between the span of the average canine bite impression on the victim's body and DMX's bite span). Other than his argument of the facts, which set forth his defense, defendant cannot show that the jury disregarded what he terms "holes in the State's case." His main argument is that admission of the song written, recorded, and published on social media and played from defendant's home to the observation of his neighbor, resulted in unfair prejudice to him.

The State, on the other hand, asserts that the song was relevant and admissible to prove that the www.myspace.com page on which the song and other information was found was defendant's page (see also Issue II) and to prove, not only defendant's knowledge that his dog was vicious, but that defendant himself was proud of the viciousness of his dog. Videos posted to defendant's page on myspace.com were titled "dmx tha killa FLEXUGOD7" and "DMX THA KILLA PIT Flexugod7."

Turning our attention to the lyrics of the song, we note that while the song does contain profanity and racial epithets, it also carries a message

consistent with defendant's claim that the victim was not killed by a dog; that defendant and DMX were scapegoats and had nothing to do with the victim's death; and that defendant's dog, having been held "hostage" for almost two years, should be freed.

Notwithstanding the message in the lyrics as to the lack of culpability of defendant and DMX in the death of the victim—a message that supported defendant's defense, we hold defendant has failed to show the trial court abused its discretion in ruling that the evidence was relevant for the purposes stated. Further, the trial court did not err in determining that the probative value was not substantially outweighed by the prejudicial effect. While the song's use of profanity and accusatory language may have inflamed the passions of the jury, the song itself was relevant and probative, outweighing any prejudicial effect. Other relevant evidence may have done the same: For example, photos of the crime scene—showing bite marks and blood—may inflame passions, but such evidence is relevant and necessary to show not only a death but, depending on the jury's view, a death due to bite marks caused by a dog.

Viewing the evidence before the jury, including prior unprovoked attacks by DMX against people and other dogs, the physical condition of Cameron's clothes and body, evidence of DNA from defendant's dog around punctures on Cameron's clothes, evidence as to cause of death—exsanguination due to dog bites, and Cameron's blood found on DMX's fur, there is no reasonable possibility that, had the song not been admitted, a different result would have been reached at trial. Defendant is unable to establish any prejudicial error. Accordingly, we overrule defendant's argument.

II

[2] Next, defendant argues that the trial court erred by admitting as evidence two exhibits taken from the internet. Defendant contends that the evidence was not properly authenticated under Rule 901. Specifically, defendant contends that the trial court erred in admitting into evidence the State's proffer of two screenshots taken from a webpage hosted by www.myspace.com with only pictures of defendant and his dog and the publication of defendant's nickname for authentication. We disagree.

"A trial court's determination as to whether a document has been sufficiently authenticated is reviewed de novo on appeal as a question of law." *State v. Crawley*, 217 N.C. App. 509, 515, 719 S.E.2d 632, 637 (2011) (citation omitted); *see generally Phillips v. Fin. Co.*, 244 N.C. 220, 92 S.E.2d 766 (1956) (per curiam) (holding that where documents

are not properly identified for admission into evidence, they are properly excluded).

"Any party may introduce a photograph, video tape, motion picture, X-ray or other photographic representation as substantive evidence upon laying a proper foundation and meeting other applicable evidentiary requirements." N.C. Gen. Stat. § 8–97 (2013). Pursuant to North Carolina General Statutes, section 8C-1, Rule 901 (Requirement of authentication or identification), "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." N.C. Gen. Stat. § 8C-1, Rule 901(a) (2013).

Defendant cites *Rankin v. Food Lion*, 210 N.C. App. 213, 706 S.E.2d 310 (2011), in support of his argument, strongly stated on appeal, but barely raised at trial. In *Rankin*, the plaintiff appealed an order granting summary judgment in favor of the defendants on the plaintiff's negligence claim. Plaintiff alleged that the defendant was the owner of the store in which she was injured. To establish ownership, the plaintiff presented two documents, printouts from internet web pages. The *Rankin* Court held that the trial court properly excluded the two internet webpage printouts from evidence: Where plaintiff made no effort to authenticate them, they could not serve as proper evidence to challenge the defendant's motion for summary judgment. *Id.* at 220, 706 S.E.2d at 315. The *Rankin* Court affirmed the trial court's grant of summary judgment. *Id.* at 222, 706 S.E.2d at 316.

Rankin is distinguishable from the instant case. In *Rankin*, the Court noted the plaintiff's failure to offer "any evidence tending to show what the documents in question were . . . and [failure to] make any other effort to authenticate these documents." *Id.* at 219, 706 S.E.2d at 315. On the other hand, in the instant case, the State presented substantial evidence, which tended to show that the website was what it was purported to be—defendant's webpage.

We look to *Hassan* for guidance as to authentication of exhibits taken from websites. In *United States v. Hassan*, the Fourth Circuit Court of Appeals considered whether exhibits taken from internet websites hosted by Facebook and YouTube, submitted in the prosecution of two defendants, were properly authenticated. 742 F.3d 104, 132 (4th Cir.), *cert. denied sub nom. Sherifi v. United States*, ___ U.S. ___, 189 L. Ed. 2d 774, *and cert. denied*, ___ U.S. ___, 190 L. Ed. 2d 115 (2014), *and cert. denied sub nom.*, *Yaghi v. United States*, ___ U.S. ___, 190 L. Ed.

2d 115 (2014). "The court . . . required the government, pursuant to Rule 901, to prove that the Facebook pages were linked to [the defendants]." *Id.* at 132–33.

> Turning to Rule 901, subdivision (a) thereof provides that, to "establish that evidence is authentic, the proponent need only present 'evidence sufficient to support a finding that the matter in question is what the proponent claims.' " *See United States v. Vidacak*, 553 F.3d 344, 349 (4th Cir.2009) (quoting Fed. R. Evid. 901(a)). *Importantly*, "*the burden to authenticate under Rule 901 is not high—only a prima facie showing is required*," and a "district court's role is to serve as gatekeeper in assessing whether the proponent has offered a satisfactory foundation from which the jury could reasonably find that the evidence is authentic." *Id.*

Id. at 133 (emphasis added). The U.S. Court of Appeals for the Fourth Circuit, upheld the trial court's determination "that the prosecution had satisfied its burden under Rule 901(a) by tracking the Facebook pages and Facebook accounts to [the defendant's] mailing and email addresses via internet protocol addresses." *Id.* at 133. *Cf. Vidacak*, 553 F.3d at 350 ("[T]he burden of authentication is not as demanding as suggested by [the defendant]—a proponent need not establish a perfect chain of custody or documentary evidence to support their admissibility. *United States v. Cardenas*, 864 F.2d 1528, 1531 (10th Cir.1989) ('deficiencies in the chain of custody go to the weight of the evidence, not its admissibility; once admitted, the jury evaluates the defects and, based on its evaluation, may accept or disregard the evidence.'). Indeed, *the prima facie showing may be accomplished largely by offering circumstantial evidence* that the documents in question are what they purport to be. *See*, *e.g.*, *United States v. Dumeisi*, 424 F.3d 566, 575–76 (7th Cir. 2005) (holding that documents of the Iraqi Intelligence Service were properly authenticated by circumstantial evidence and witness testimony); *United States v. Elkins*, 885 F.2d 775, 785 (11th Cir. 1989) ('Use of circumstantial evidence alone to authenticate a document does not constitute error.')." (emphasis added)) (citing *United States v. Safavian*, 435 F.Supp.2d 36, 38 (D.D.C.2006) ("[t]he Court need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the jury ultimately might do so") in its discussion of the threshold requirements for a proffer of evidence to satisfy

Fed. R. Evid. 901(a));[2] *see also State v. Taylor*, 178 N.C. App. 395, 413, 632 S.E.2d 218, 230 (2006) (holding the text messages admitted were properly authenticated pursuant to Rule 901 where a telecommunications employee, who kept track of all incoming and outgoing text messages, testified that the messages were stored on the company server and accessible via the company's website with the proper access code, and the manager of a cellphone store testified that the text messages he retrieved were accessed from the telecommunication company's server with the access code for the phone the manager issued to the victim).

In the instant case, the record reflects the trial court's synopsis of a meeting conducted out of the presence of the jury, during which the trial court was notified that the State sought to introduce evidence discovered the previous night by a law enforcement officer on a social media website. The prosecutor contended that "[t]he actual page that shows pictures of the defendant and his name, so that we can authenticate for the jury that this is his myspace page. It also includes the dog in question, DMX."

> Also, within the myspage page, there is a short video of DMX on a chain being called, although chained up, pulling against the chain, and also a posting of a song, which the [c]ourt has previously previewed, but talks about this case and the defendant's denial that his dog did this, but also a lot of other references, your Honor, that would fit the State's theory of the case that the defendant has a careless disregard for life and for the safety of others.

In response, defendant first moved to suppress the recently discovered evidence based on the late notice, then defendant argued

> that with regard to authentication, simply because it has been said that this page or these pages are in my client's name, do not necessarily mean that he posted any of this material. I don't know if there has been, um, what would need to be done to trace this back to a particular IP address or whatever at this time. So, I think authentication would certainly be an issue that we would raise.

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2. N.C. Rule of Evidence 901 (N.C. Gen. Stat. § 8C-1, Rule 901) "is identical to Fed. R. Evid. 901 except that in example 10 [(under subsection (b) 'Illustrations')] the word 'statute' is inserted in lieu of the phrase 'Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.'" N.C.G.S. § 8C-1, Rule 901, official commentary (2015).

To the extent defendant's objection was based on insufficient authentication, it was not clearly a part of his suppression motion. The trial court overruled defendant's objections reasoning that the State had stated a forecast of the foundation and a valid evidentiary purpose for the evidence and had a good faith basis to expect the evidence to be admitted at trial. The court noted further foundation would need to be provided when witnesses were called. Defendant took no exception to the trial court's ruling, and failed to raise a further objection either during direct or cross-examination of witness testimony regarding the newly discovered evidence.

At trial, Detective Clark testified that while investigating this case he came across a "myspace page with the name of Flexugod/7." On that page he found photos of defendant and videos. Detective Clark testified that the dog depicted on the webpage was the dog held in custody, DMX. Detective Clark testified that during the course of his investigation he photographed a certificate awarded to defendant, on which defendant is referred to as "Flex." In the course of Detective Clark's search on www.myspace.com, he found a video posted to another social media website, www.youtube.com, depicting defendant's dog, DMX. The video was not played for the jury. Detective Clark also introduced a song that he found as a result of his internet search but did not indicate on what website the song was found. Detective Clark testified he recognized the voice in the song as that of defendant's.[3] This song is the same "rap" song we reviewed in Issue I and determined the trial court did not err in admitting the song as relevant and not unduly prejudicial.

On this record, the evidence is sufficient to support a *prima facie* showing that the myspace webpage at issue was defendant's webpage. While tracking the webpage directly to defendant through an appropriate electronic footprint or link would provide some technological evidence, such evidence is not required in a case such as this, where strong circumstantial evidence exists that this webpage and its unique content belong to defendant.

The webpage contained content unique to defendant, whose nickname was "Flex" and webpage name was "Flexugod/7": it contained pictures of defendant; pictures of his dog, DMX; it contained video captioned "DMX tha Killer Pit" and another video captioned "After a Short Fight, he killed that mut." Not only was the content distinctive

3. Detective Clark interviewed defendant prior to trial and testified that he was familiar with defendant's voice.

and unique to defendant and DMX, it was directly related to the facts in issue—whether defendant had been criminally negligent in allowing his dangerous dog to attack and kill a man. Thus, the trial court did not err in admitting the screenshots of the webpage hosted by www.myspace.com as defendant's webpage.

Further, we note for defendant and for the record that even assuming *arguendo* the trial court erred, given the evidence before the jury regarding prior unprovoked attacks by defendant's dog against both people and other dogs, the cause of Cameron's death, the physical condition of Cameron's clothes and body, evidence of DNA from defendant's dog found around punctures on Cameron's clothes, and Cameron's blood found on the dog's fur, there is no reasonable possibility that, had the webpage screenshots not been admitted, a different result would have been reached at the trial. Accordingly, we overrule defendant's argument.

III

[3] Lastly, defendant argues that the trial court committed plain error by allowing a pathologist to opine that Cameron's death was due to dog bites. Defendant, who did not object to this testimony at trial, now contends that pathologist, Dr. Samuel Simmons, was in no better position than the jurors "to speculate that the source of the puncture wounds was specifically a dog." We disagree.

> In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C. R. App. P. 10(a)(4) (2015). "To show plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Brown*, 221 N.C. App. 383, 389, 732 S.E.2d 584, 589 (2012) (citation and quotations omitted).

> To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations and quotations omitted).

Pursuant to North Carolina General Statutes, section 8C-1, Rule 702,

> [i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2015). Further, pursuant to Rule 702, "[t]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." *Id.* § 8C-1, Rule 704.

> In interpreting Rule 704, this Court draws a distinction between testimony about legal standards or conclusions and factual premises. An expert may not testify regarding whether a legal standard or conclusion has been met at least where the standard is a legal term of art which carries a specific legal meaning not readily apparent to the witness. Testimony about a legal conclusion based on certain facts is improper, while opinion testimony regarding underlying factual premises is allowable.

State v. Trogdon, 216 N.C. App. 15, 20–21, 715 S.E.2d 635, 639 (2011) (citation omitted).

Here, Dr. Samuel Simmons, a medical doctor, was admitted to testify as an expert in the field of forensic pathology. Prior to the trial court's ruling to admit Dr. Simmons's testimony as that of an expert, Dr. Simmons testified that "[f]orensic pathology [was] a subspecialty of pathology, and it's specifically the area that looks at things that causes death in the human body whether that be natural disease or some external force." As to the wounds on Cameron's body, Dr. Simmons gave the following testimony.

Q. Dr. Simmons, you just testified that there was [sic] a number of puncture wounds and abrasions or excoriations found on Mr. Cameron at the time of the autopsy. Based upon the pattern and the nature of these items or wounds, do you have an opinion as to the source of these wounds?

A. I think overall the patter is consistent with animal bites. These would also be consistent with dog bites as well.

Pictures of the wounds on Cameron's body were shown to the jury during Dr. Simmons' testimony. Dr. Simmons pointed out impressions that he interpreted as teeth impressions from canine teeth, "which are the two pointiest teeth inside a person's mouth or an animal's mouth." Dr. Simmons testified that based on his autopsy, he formed the opinion that the cause of Cameron's death was exsanguination due to dog bites.

On cross-examination, Dr. Simmons was presented with a photograph of defendant's dog's mouth and teeth. Dr. Simmons testified that "in my experience and from reading about these cases, you very seldom see a case where every single bite mark looks the same regardless of whether it's one dog or multiple dogs." He could not say that all the wounds on the victim's body had been definitely caused by one animal.

Nevertheless, Dr. Simmons's expert opinion on the victim's cause of death was based on his autopsy of Cameron's body, including his observation of the bite marks on the body, as well as from "[his] experience and from reading about these cases." Therefore, the admission of Dr. Simmons's opinion testimony was proper under Rule 702 ("a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion," N.C.G.S. § 8C-1, Rule 702) and was also in accordance with Rule 704 ("[t]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact[,]" *Id.* § 8C-1, Rule 704). Defendant cannot establish that the admission of Dr. Simmons' testimony that Cameron's wounds were the result of dog bites amounted to plain error. Accordingly, we overrule this argument.

NO ERROR; NO PLAIN ERROR.

Judges DIETZ and TYSON concur.

STATE OF NORTH CAROLINA
v.
CURTIS RAY GATES, JR., DEFENDANT

No. COA15-584

Filed 16 February 2016

1. Sexual Offenses—first-degree sexual offense—serious personal injury—evidence sufficient for instruction

The trial court did not err by instructing the jury on first-degree sexual offense where the State proceeded on the basis of serious personal injury and the evidence demonstrated that an officer saw blood on the victim's lip; that she went to the emergency room for four hours where her injuries were photographed; the photographs verified that she suffered bruises on her ribs, arms, and face; she testified that she was in pain for four or five days afterwards; she felt unsafe being alone, broke her lease and moved across the state to be with her family two months after the incident; and at the time of trial, roughly a year later, she still felt unsafe.

2. Indictment and Information—variance—not fatal

There was not a fatal variance between the date of the crimes alleged in the indictment and the evidence offered by the State at trial where defendant was indicted for first-degree sexual offense, first-degree kidnapping, and crime against nature. Time was not an essential element of the offenses, no alibi defense was raised, no statute of limitations was implicated, and defendant did not argue that the discrepancy in any way prejudiced his defense. The variance alone was not fatal to the indictment.

Appeal by defendant from judgment entered 28 October 2014 by Judge Charles H. Henry in Onslow County Superior Court. Heard in the Court of Appeals 3 November 2015.

Roy Cooper, Attorney General, by Ellen A. Newby, Assistant Attorney General, for the State.

Paul F. Herzog for defendant-appellant.

ZACHARY, Judge.

Where there was evidence to support a finding that the victim suffered serious personal injury, the trial court did not err in instructing the

jury on first-degree sexual offense. Where time was not of the essence, and defendant did not allege prejudice, the State's failure to physically amend the indictment as ordered by the trial court to remedy a discrepancy between the date of offense alleged in the indictment and that supported by the State's evidence was not fatal and did not deprive the trial court of jurisdiction.

I. Factual and Procedural Background

On 13 July 2013, Curtis Ray Gates, Jr. (defendant), a member of the United States Marine Corps stationed at Camp Lejeune, was on base washing clothes. After finishing his laundry, he returned home to his wife, and then went out. In the early morning of 14 July 2013, defendant passed a bar on Dewitt Street in Jacksonville called Hooligans, and stopped in the parking lot to see why it was so crowded. In the parking lot, defendant saw a woman leaning against her car.

According to the woman, A.A., she was in her vehicle when defendant opened the door, struck her in the face, punched her in the abdomen, dragged her from the vehicle, and forced her to perform oral sex on him. According to defendant, the two flirted, A.A. had been taking ecstasy, and she voluntarily engaged in oral sex.

Officer Chris Funcke, a member of the Jacksonville Police Department, was in the area investigating a disturbance. When he approached, he found A.A. performing oral sex on defendant. A.A. immediately rushed to Officer Funcke, crying hysterically and appearing to be in distress, stating that defendant was "going to rape and kill her." She claimed that defendant had struck her and dragged her to where Officer Funcke found them. A.A. was disheveled; her makeup was smeared, the side of her face "was red, as if she had been struck with something[,]" and Officer Funcke detected marks nearby, indicating that somebody had been dragged to where he observed A.A. and defendant initially. Officer Funcke also testified that he saw a bit of blood on A.A.'s lip, but none on her face. Another officer testified that there were dirt and grass stains on the tops of A.A.'s shoes. A.A. was then transported by EMS to Onslow Memorial Hospital.

In the emergency room of Onslow Memorial Hospital, Officer Steve Moquin took photographs of A.A.'s injuries, which included bruising and swelling on the left side of her face, above the cheek bone and above the left eye; an abrasion and bruise to the right side of her right cheek; bruising on both sides of her neck, consistent with the grip of a hand; an abrasion on her right elbow; an abrasion on the heel of her right hand; an abrasion on the outside of her left ankle; and an injury on her bottom

lip. The injuries appeared to be fresh, and there was still dirt in some of them. Another officer, Officer Ashley Potter, observed that A.A.'s left knee was swelling. At the hospital, A.A. complained that the left side of her abdomen was sore and, upon inspection, staff saw four red marks, consistent with the spacing of knuckles. A.A. testified that she continued to experience pain for four or five days after the assault.

On 13 May 2014, the Onslow County Grand Jury indicted defendant for second-degree sexual offense, first-degree kidnapping, and crime against nature. On 10 June 2014, a superseding indictment was entered by the Grand Jury, charging defendant with first-degree sexual offense, first-degree kidnapping, and crime against nature.

On 9 October 2014, the jury found defendant guilty of first-degree sexual offense, first-degree kidnapping, and crime against nature. The jury's verdict of guilty on the charge of first-degree kidnapping was based both upon the fact that A.A. was not released in a safe place, and the fact that A.A. was sexually assaulted. The jury further found that the restraint or removal of A.A. facilitated the commission of both a crime against nature and a first-degree sexual offense.

The trial court found defendant to be a prior record level I. A Static-99 assessment submitted to the court found defendant to be a low risk. The trial court consolidated judgment on the three guilty verdicts, and sentenced defendant to an active sentence in the presumptive range of 240-348 months imprisonment.

Defendant gave oral notice of appeal at trial.

II. Jury Instruction

[1] In his first argument, defendant contends that the trial court erred in instructing the jury on first-degree sexual offense. We disagree.

A. Standard of Review

"[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973), *cert. denied*, 418 U.S. 905, 41 L. Ed. 2d 1153 (1974). "[A] trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial." *Id.* "Where jury instructions are given without supporting evidence, a new trial is required." *State v. Porter*, 340 N.C. 320, 331, 457 S.E.2d 716, 721 (1995).

B. Analysis

The State's case on first-degree sexual offense proceeded on the theory that A.A. suffered "serious personal injury." Defense counsel objected, contending that the jury should only be instructed on second-degree sexual offense, because A.A.'s injuries were "minor scrapes and abrasions." The trial court instructed the jury on both first-degree and second-degree sexual offense, defining serious injury as "any type of injury that causes great pain and suffering." Defendant maintains that this theory of first-degree sexual offense was unsupported by the evidence, and that therefore the trial court erred in instructing the jury on that charge.

First-degree sexual offense is defined in N.C. Gen. Stat. § 14-27.4, which provides in relevant part that "[a] person is guilty of a sexual offense in the first degree if the person engages in a sexual act . . . [w]ith another person by force and against the will of the other person, and . . . [i]nflicts serious personal injury upon the victim or another person[.]" N.C. Gen. Stat. § 14-27.4(a)(2)(b) (2013). Whether an injury is serious is a finding of fact to be determined by a jury. *State v. Boone*, 307 N.C. 198, 203-04, 297 S.E.2d 585, 589 (1982), *overruled on other grounds by State v. Richmond*, 347 N.C. 412, 495 S.E.2d 677 (1998); *see also State v. Ackerman*, 144 N.C. App. 452, 459-60, 551 S.E.2d 139, 144 (2001). Mental injury may also be considered. *Id.* at 204, 297 S.E.2d at 589; *see also Ackerman*, 144 N.C. App. at 460, 551 S.E.2d at 144.

Defendant asserts that the evidence at trial of serious personal injury was insufficient to support the instruction on first-degree sexual offense. However, the general rule is that, "if there be any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury." *State v. Summitt*, 301 N.C. 591, 597, 273 S.E.2d 425, 428 (citations and quotations omitted), *cert. denied*, 451 U.S. 970, 68 L.Ed.2d 349 (1981). In the instant case, the evidence demonstrated that Officer Funcke saw some blood on A.A.'s lip. In addition, A.A. went to the emergency room for four hours where her injuries were photographed, and the photographs verified that A.A. suffered bruises on her ribs, arms, and face. A.A. testified that she was in pain for four or five days afterwards. The evidence further indicated that, due to her feeling of a lack of safety, A.A. left her boyfriend, terminated her lease, and moved back in with her family, and at the time of trial, roughly a year later, still felt unsafe being alone.

Defendant relies on *Boone*, a case in which there was no evidence of physical or residual mental injury. In that case, the evidence at trial revealed only that, on the morning of the offense, "the victim was shaking, crying and 'hysterical' immediately after the crime was committed and after the officers arrived on the morning of the crime." *Boone*, 307 N.C. at 205, 297 S.E.2d at 590. Our Supreme Court noted that:

> This record does not disclose that there was any residual injury to the mind or nervous system of the victim after the morning of the crime. The hysteria and crying described by the witnesses occurred nearly coincident with the crime and were results that one could reasonably expect to be present during and immediately after any forcible rape or sexual offense has been committed upon the female's person.

Id. The Court observed that "ordinarily the mental injury inflicted must be more than the *res gestae* results present in every forcible rape and sexual offense[,]" and held that the evidence in *Boone* was insufficient to support a finding of serious personal injury. *Id.* Unlike *Boone*, however, the instant case offers ample evidence of physical injury, including injuries to A.A.'s face, neck, arms, and legs.

Defendant also contends that there was insufficient evidence of lingering mental injury. However, our Supreme Court held in *Boone* that "[i]t is impossible to enunciate a 'bright line' rule as to when the acts of an accused cause mental upset which could support a finding of 'serious personal injury[,]' " and that:

> In order to support a jury finding of serious personal injury because of injury to the mind or nervous system, the State must ordinarily offer proof that such injury was not only caused by the defendant but that the injury extended for some appreciable time beyond the incidents surrounding the crime itself.

Id. at 205, 297 S.E.2d at 589-90. We have since held this to mean that "if a mental injury extends for some appreciable time, it is therefore a mental injury beyond that normally experienced in every forcible rape." *Ackerman*, 144 N.C. App. at 460, 551 S.E.2d at 144 (quoting *State v. Easterling*, 119 N.C. App. 22, 40, 457 S.E.2d 913, 924, *disc. review denied*, 341 N.C. 422, 461 S.E.2d 762 (1995)). The evidence in the instant case demonstrates that two months after the incident, A.A. broke her lease and moved to Asheville with her family, and that roughly a year

later, A.A. still felt unsafe while alone. This evidence of A.A.'s residual mental injury is sufficient to support a finding of serious personal injury.

We hold that the evidence at trial was sufficient to go to a jury, and that the trial court did not err in instructing the jury on first-degree sexual offense.

This argument is without merit.

III. Indictment

[2] In his second argument, defendant contends that there was a fatal variance between the date of the crimes alleged in the indictment and the evidence offered by the State at trial. We disagree.

A. Standard of Review

"An attack on an indictment is waived when its validity is not challenged in the trial court." *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000). "However, where an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court." *Id.*

B. Analysis

The superseding indictment in this case listed the date of the offenses as 10 May 2013. At trial, the State moved to amend the superseding indictment to indicate that 14 July 2013 was the date of the offenses. The trial court allowed this motion, but the physical document was never amended. Defendant contends that the failure to physically execute the amendment created a fatal variance in the indictment.

Even assuming, *arguendo*, that this resulted in a variance, "our courts have recognized the general rule that '[w]here time is not of the essence of the offense charged and the statute of limitations is not involved, a discrepancy between the date alleged in the indictment and the date shown by the State's evidence is ordinarily not fatal.' " *State v. Poston*, 162 N.C. App. 642, 647, 591 S.E.2d 898, 902 (2004) (quoting *State v. Locklear*, 33 N.C. App. 647, 653-54, 236 S.E.2d 376, 380, *disc. review denied*, 293 N.C. 363, 237 S.E.2d 851 (1977)).

In *Poston*, the defendant was originally indicted on fifteen sexual offense charges arising from incidents that occurred between 1993 and 2000. Defendant was ultimately convicted of, among other charges, two counts of first-degree sexual offense that were alleged in the indictments to have occurred between June and July of 1994, and in early to

mid-October of 1997. *Id.* at 645-46, 591 S.E.2d at 901. On appeal, defendant contended that the trial court should have dismissed these charges due to a lack of evidence that the offenses were committed during the periods alleged in the indictments. *Id.* at 646-47, 591 S.E.2d at 902. We first noted that, where defendant presented no alibi defense with respect to the date of the offenses, the date was immaterial. *Id.* at 648, 591 S.E.2d at 902. Moreover, although double jeopardy was implicated by the State's dismissal of several charges, the remaining indictments each corresponded to an incident for which the charges were not dismissed. Had there been more indictments than incidents, the dates might have been material, but because there was an even ratio, the dates alleged in the indictments were not material. *Id.* at 649-50, 591 S.E.2d at 903. Lastly, we observed that, although the dates were relevant for the purpose of sentencing under the Fair Sentencing Act, that issue had no impact on the jury's determination of defendant's guilt. *Id.* at 650-51, 591 S.E.2d at 904.

In the instant case, defendant was indicted for first-degree sexual offense, first-degree kidnapping, and crime against nature. Time is not an essential element of any of these crimes. Further, all three offenses are felonies. N.C. Gen. Stat. §§ 14-27.4(a)(2)(b), 14-39, 14-177 (2013). In North Carolina, "no statute of limitations bars the prosecution of a felony." *State v. Taylor*, 212 N.C. App. 238, 249, 713 S.E.2d 82, 90 (2011) (quoting *State v. Johnson*, 275 N.C. 264, 271, 167 S.E.2d 274, 279 (1969)). Defendant does not argue any of the issues raised in *Poston*, instead merely alleging that the variance alone, by merit of its bare existence, was sufficient to be fatal to the indictment.

Because time was not an essential element of the offenses, no alibi defense was raised, and no statute of limitations was implicated, the discrepancy between the date alleged in the indictment and that shown by the State's evidence was not automatically fatal. Nor does defendant argue that this discrepancy in any way prejudiced his defense; rather, defendant simply asserts that, in this specific case, this Court should overlook the precedent of cases like *Poston* which held the discrepancy not fatal. We decline to do so.

This argument is without merit.

IV. Conclusion

In conclusion, there was ample evidence of A.A.'s injuries, both physical and mental, to support the trial court's jury instruction on first-degree sexual offense, and therefore the trial court did not err issuing

that instruction to the jury. Further, as time was not of the essence and the statute of limitations was not implicated, any variance between the indictment, which was never physically amended, and the evidence at trial was not fatal, and did not deprive the trial court of jurisdiction.

NO ERROR.

Judges BRYANT and CALABRIA concur.

STATE OF NORTH CAROLINA
v.
THOMAS D. KNIGHT

No. COA14-1015

Filed 16 February 2016

1. Criminal Law—retrial—evidentiary ruling in first trial—not binding in retrial

Where defendant's trial for several offenses related to the rape of his neighbor ended in a mistrial and he was found guilty when he was retried the following year, the Court of Appeals rejected his argument that the judge in the second trial was bound by the decision of the judge in the first trial suppressing defendant's videotaped statement to police. The law of the case and collateral estoppel doctrines did not apply. When a defendant is retried following a mistrial, prior evidentiary rulings are not binding. Once a mistrial has been declared, "in legal contemplation there has been no trial."

2. Evidence—videotaped statement to police—failure to show defendant understood Miranda rights

In defendant's retrial for several offenses related to the rape of his neighbor, the trial court erred by denying defendant's motion to suppress a videotaped statement he made to police, but the error was not prejudicial. Although defendant answered the officer's questions after being *Mirandized*, the State failed to make the "additional showing" by the preponderance of the evidence that defendant understood his rights and the consequences of waiving them. The error was not prejudicial because in the video recording defendant did not confess to the crime—rather, he adamantly proclaimed his innocence. Further, there was overwhelming evidence of defendant's guilt.

3. Kidnapping—to perpetrate rape—separate and independent act

In defendant's retrial for several offenses related to the rape of his neighbor, the trial court did not err by denying defendant's motion to dismiss the first-degree kidnapping charge. When defendant picked up the victim and moved her from her living room couch to her bedroom, he moved her away from open exterior doors and decreased her ability to attract attention and help from her neighbors, rendering the kidnapping a separate and independent act.

Judge STROUD concurring in part and dissenting in part.

Appeal by defendant from judgment entered 7 February 2014 by Judge Kendra D. Hill in Wake County Superior Court. Heard in the Court of Appeals 22 April 2015.

Attorney General Roy Cooper, by Assistant Attorney General Amy Kunstling Irene, for the State.

Cooley Law Office, by Craig M. Cooley, for defendant.

CALABRIA, Judge.

Defendant Thomas D. Knight ("defendant") appeals from judgment entered upon a jury verdict finding him guilty of second degree rape and first degree kidnapping. We conclude that defendant's trial was free from prejudicial error.

I. Background

In October 2012, forty-six-year-old victim T.H., a divorced mother of two adult children, resided in Fuquay-Varina. She had a boyfriend but lived alone. T.H. and defendant—who lived with his girlfriend, Leslie Leicht ("Leicht")—were neighbors and had known each other for approximately one year. Over the course of that year, T.H. and defendant "hung out" at T.H.'s home about ten to fifteen times, mainly to talk, drink alcohol, and smoke marijuana. T.H. also allowed defendant to drive her car on certain occasions. Whenever they got together, T.H. usually drank three to four beers, while defendant preferred vodka.

Although T.H. had a boyfriend and lived alone, she and defendant enjoyed a light-hearted, platonic relationship. However, defendant occasionally made sexually suggestive comments such as "once you go black you'll never go back," to which T.H. dismissively replied that she had

"made it this far without that so [she would] be fine." T.H. felt that defendant was "[j]ust talking junk" and she did not take his innuendos seriously. But in T.H.'s words, defendant "crossed the line" during an August 2012 incident.

On 23 August 2012, defendant came to T.H.'s home and brought her a kitten; he then "took off." Nearly an hour later, defendant suddenly entered T.H.'s home through an open back door, threw her on the bedroom floor, and positioned himself on top of her. After T.H. asked defendant "[w]hat in the fu**" he was doing[,]" defendant answered, "[y]ou want this, Bit**." In response, T.H. hit defendant in the face and told him to leave her home immediately, which he did. Soon after the incident, defendant texted T.H. and apologized for scaring her. He also promised that "it" would never happen again. T.H. accepted defendant's apology and got together with him two or three times between August and October of 2012.

In the late afternoon of 12 October 2012, T.H. texted defendant and asked him to get her some marijuana, something he had done for her on several prior occasions. Defendant agreed, and the two traveled to Angier in T.H.'s car to get the marijuana. After they returned to T.H.'s residence around 6:30 p.m., T.H. and defendant sat on the living room couch while drinking, getting high, watching TV, and talking about their respective relationships. During the course of the evening, defendant drank vodka straight from the bottle and T.H. consumed five beers along with two shots of vodka.

Sometime before 9:30 p.m., defendant abruptly picked T.H. up off the couch, pinned her arms against her body, and carried her to the bedroom. T.H. screamed at defendant and asked what he was doing, but he did not respond. Once in the bedroom, defendant threw T.H. on the bed, held her down, and proceeded to remove her jeans and underwear as she continued to yell and scream. After unfastening his pants, defendant vaginally penetrated T.H. for approximately ten minutes before pausing to proclaim, "now you're a real woman because you've been fu**ed by a black man," to which T.H. replied, "well, now you have HIV." Angered by that reply and believing that he might contract AIDS, defendant ceased penetrating T.H. and began hitting her face. Defendant then put his penis in T.H.'s mouth, prompting her to bite it. Somewhat stunned, defendant backed away, which allowed T.H. to get away from defendant and run out of the home.

Wearing only a sweater, T.H. eventually made it to the home of a neighbor, Beth Branham ("Branham"), who noticed blood on T.H.'s

lower lip. After giving T.H.—who was distraught and crying—some sweatpants to wear, Branham called the police. Several officers with the Fuquay-Varina Police Department ("FVPD") arrived at Branham's home, and T.H. told them what happened.

The officers then proceeded to T.H.'s home, where they found defendant's white t-shirt in the front yard. Inside the bedroom, the bed covers were in disarray and T.H.'s pants and panties were inside out on the floor. In addition, fresh red blood and hair that seemed to have come from T.H.'s scalp were found on the bedding.

Meanwhile, defendant had gone to a friend's house, where Leicht picked him up in her car. As the two drove home, defendant noticed police cars in the area and had Leicht drop him off at a nearby gas station. FVPD officers apprehended defendant at the gas station shortly thereafter. At that time, defendant was carrying two cell phones, one of which belonged to T.H., and he claimed to be waiting for someone to bring him money. After defendant was transported to the FVPD, Detective Jeff Wenhart questioned him regarding T.H.'s allegations. Detective Wenhart noticed scratches on defendant's nose and cheek as well as fresh blood on his shirt. A long, reddish head hair consistent with that of T.H. was found on defendant's face. During the videotaped interview, defendant acknowledged spending time with T.H. and agreeing to purchase marijuana for her on the night in question, but he denied having sex with her. He also explained that either his dog or T.H.'s cat had scratched his face and that he had recently bit his tongue, which caused the blood stain on his shirt.

On 27 November 2012, defendant was indicted on one count each of second degree forcible rape, second degree sexual offense, and first degree kidnapping. In a separate indictment, defendant was also charged with assault on a female, common law robbery, and interfering with an emergency communication.

2013 Trial

On 5 August 2013, defendant was tried in Wake County Criminal Superior Court before the Honorable Reuben F. Young. During trial, defendant moved to suppress his statement to Detective Wenhart. After viewing the videotape of defendant's interview and hearing arguments on the issue, Judge Young ruled that the questions Detective Wenhart asked violated *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), and ordered that defendant's statement be suppressed. At the close of all evidence, Judge Young dismissed the charges of common

law robbery and interfering with an emergency communication. On 8 August 2013, the jury found defendant guilty of assault on a female, but was unable to reach a unanimous verdict as to the kidnapping, rape, and sexual assault charges, prompting Judge Young to declare a mistrial on those three charges.

2014 Trial

In February 2014, defendant was retried on the charges of second degree rape, second degree sexual offense, and first degree kidnapping in Wake County Superior Court before the Honorable Kendra D. Hill. During trial, the State revisited the issue of Judge Young's suppression ruling in the 2013 trial and argued that Judge Hill had the authority to overrule it. Judge Hill felt the issue presented a "close question[,]" but she eventually ruled that defendant's statement to Detective Wenhart was admissible. At the close of all evidence, defendant moved that the kidnapping charge be dismissed, arguing that there was insufficient evidence of "a separate . . . act independent and apart from the potential two underlying felonies" (second degree rape and second degree sexual offense). Judge Hill denied the motion.

Defendant testified in his own defense as to what happened at T.H's home during the evening of 12 October 2012. According to defendant, while he and T.H. were sitting on the living room couch, T.H. leaned in and kissed him. At one point in the evening, T.H. got up to use the bathroom and, upon her return, she was wearing nothing but her sweater and underwear. T.H. asked defendant to "[c]ome here." In response, defendant resumed kissing T.H. before eventually moving her to the bedroom. Once there, defendant fell backwards onto the bed with T.H. on top of him. Eventually, defendant rolled T.H. over and got on top of her, but upon his doing so, she "freaked out," hit and "flicked" him in the face, began screaming, and ran out the front door. Defendant denied having sex with T.H., and claimed that he neither removed her clothes nor attempted to put his penis in her mouth.

The jury found defendant guilty of second degree rape and first degree kidnapping, but acquitted him on the second degree sexual offense charge. Judge Hill then consolidated the two convictions, sentencing defendant to a minimum of 90 and a maximum of 168 months in the custody of the North Carolina Department of Public Safety, Division of Adult Correction. Defendant appeals.

II. Analysis

A. Judge Young's Ruling

1. *Law of the Case*

[1] Defendant first argues that because Judge Young suppressed defendant's videotaped statement in the 2013 trial, Judge Hill was bound by that ruling in the 2014 trial. This argument is partially premised on the law of the case doctrine.

According to the law of the case doctrine, " 'once an appellate court has ruled on a question, that decision becomes the law of the case and governs the question both in subsequent proceedings in a trial court and on subsequent appeal.' " *State v. Boyd*, 148 N.C. App. 304, 308, 559 S.E.2d 1, 3 (2002) (quoting *Weston v. Carolina Medicorp, Inc.*, 113 N.C. App. 415, 417, 438 S.E.2d 751, 753 (1994)). From the outset, we note that this legal principle does not apply here because there has been no prior appeal in this case.

Even so, another version of the doctrine, which is relevant here, provides that "when a party fails to appeal from a tribunal's decision that is not interlocutory, the decision below becomes the law of the case and cannot be challenged in subsequent proceedings in the same case." *Boje v. D.W.I.T.*, 195 N.C. App. 118, 122, 670 S.E.2d 910, 912 (2009) (internal quotation mark omitted).

Defendant contends that once Judge Young ruled on defendant's motion to suppress, the State had the right to appeal pursuant to N.C. Gen. Stat. § 15A-979(c), which provides that "[a]n order by the superior court granting a motion to suppress prior to trial is appealable to the appellate division of the General Court of Justice prior to trial. . . . " According to defendant, by failing to appeal the ruling, "the State waived its right to challenge [the] order and its waiver made Judge Young's suppression decision . . . binding in future proceedings." Defendant also makes a separate, but related, argument[1] based on the rule "that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." *State v. Macon*, 227 N.C. App. 152, 156, 741 S.E.2d 688, 690 (internal

1. We note that defendant cites this rule in his discussion on res judicata and collateral estoppel, but we find it more appropriate to discuss it in the context of the law of the case doctrine. The essence of all defendant's arguments on the suppression issue is that Judge Young's ruling was absolutely binding on Judge Hill.

quotations and citations omitted), *review denied*, 367 N.C. 238, 748 S.E.2d 545 (2013). Both arguments are without merit.

To begin, subsection 15A-979(c) applies only when a pretrial order granting a motion to suppress has been entered. Notably, the comment to section 15A-979 provides that "[t]he phrase 'prior to trial' unquestionably will be interpreted to mean prior to the attachment of jeopardy." N.C. Gen. Stat. § 15A-979 cmt. 1 (2013). Jeopardy attaches when "a competent jury has been empaneled and sworn." *State v. Priddy*, 115 N.C. App. 547, 550, 445 S.E.2d 610, 613 (1994). In the instant case, because Judge Young's suppression ruling was entered *during* defendant's 2013 trial, the State had no right to appeal it pursuant to subsection 15A-979(c). Consequently, Judge Young's ruling was not conclusive and did not become the law of the case in future proceedings.

Moreover, when a defendant is retried following a mistrial, prior evidentiary rulings are not binding. *State v. Harris*, 198 N.C. App. 371, 376, 679 S.E.2d 464, 468 (2009). Indeed, once a mistrial has been declared, "in legal contemplation there has been no trial." *State v. Sanders*, 347 N.C. 587, 599, 496 S.E.2d 568, 576 (1998) (quoting *State v. Tyson*, 138 N.C. 627, 629, 50 S.E. 456, 456 (1905)). "When a defendant's trial results in a hung jury and a new trial is ordered, the new trial is '[a] trial *de novo*, unaffected by rulings made therein during the [original] trial.' " *Harris*, 198 N.C. App. at 376, 679 S.E.2d at 468 (quoting *Burchette v. Lynch*, 139 N.C. App. 756, 760, 535 S.E.2d 77, 80 (2000) ("[A] 'mistrial results in nullification of a pending jury trial.' " (citation omitted)).

Here, when Judge Young declared a mistrial on the kidnapping, rape, and sexual assault charges, his ruling on defendant's motion to suppress "no longer had [any] legal effect." *Id.* at 376, 679 S.E.2d at 468. Indeed, the rule that one Superior Court judge may not overrule another never came into play. Accordingly, Judge Hill's discretion was not limited at defendant's retrial, and she was free to rule anew on his motion to suppress.

2. *Res Judicata and Collateral Estoppel*

Defendant also argues the doctrines of res judicata and collateral estoppel barred the State from re-litigating the suppression of his statement. Specifically defendant contends that, since Judge Young made factual findings to support his suppression ruling, and since the jury reached a verdict on one relevant issue, i.e., the assault on a female conviction, the admissibility of defendant's statement was conclusively determined at the 2013 trial. We disagree.

First off, although defendant's brief mentions res judicata in passing, he makes no cognizable argument as to how the doctrine applies in this case. Therefore, this argument has been abandoned. N.C.R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

We now turn to defendant's collateral estoppel argument. "Under the doctrine of collateral estoppel, an *issue* of ultimate fact, once determined by a valid and final judgment, cannot again be litigated between the same parties in any future lawsuit." *State v. Edwards*, 310 N.C. 142, 145, 310 S.E.2d 610, 613 (1984).

Judge Young appropriately made factual findings to support his ruling on defendant's motion to suppress. But that evidentiary ruling involved a question of law based on largely undisputed facts; the admissibility of defendant's statement turned on whether he had knowingly and voluntarily waived his *Miranda* rights. Indeed, no issues of "ultimate fact" were determined as to the kidnapping, rape, and sexual assault charges because no "valid and final judgment" was entered on them. "[T]he doctrine of collateral estoppel applies only to an issue of ultimate fact determined by a final judgment." *Macon*, 227 N.C. App. at 157, 741 S.E.2d at 691. When Judge Young declared a mistrial on those charges, his ruling granting defendant's motion to suppress was vacated and had no enduring legal effect. *Harris*, 198 N.C. App. at 376, 679 S.E.2d at 468. Accordingly, Judge Hill was not bound by any of Judge Young's prior rulings and the doctrine of collateral estoppel is inapplicable to this case.

B. Judge Hill's Suppression Ruling at Defendant's 2014 Trial

[2] Defendant next argues the trial court erred in denying his motion to suppress the statement he made to Detective Wenhart during a recorded interview at the FVPD. We agree, but ultimately conclude that defendant was not prejudiced by the error.

According to the interview transcript, the following exchange occurred between defendant and Detective Wenhart:

> [Det. Wenhart]: Okay. As officer (Inaudible) was getting ready to explain to you -- had mentioned to you, obviously, we're investigating what has been alleged as a sexual offense crime. Okay?
>
> . . .
>
> This is your opportunity, should you so desire, to put your side of the story --

[defendant]: No -- I don't --

[Det. Wenhart]: -- You know, to tell your side of the story so that we can get to the bottom of what happened.

[defendant]: Man, I don't have no side --

[Det. Wenhart]: So before -- before I ask you any questions you must understand your rights.

You have the right to remain silent and not make any statement.

[defendant]: So now, I'm under arrest?

[Det. Wenhart]: Anything you -- well --

[defendant]: I'm under arrest.

[Det. Wenhart]: Okay.

[defendant]: If you're reading me my rights, I'm under arrest.

. . .

[Det. Wenhart]: [W]ell, first off, relax, because when we read somebody their rights it doesn't necessarily mean they're under arrest.

. . .

[Det. Wenhart]: You are in custody, hence the handcuffs.

[defendant]: Yeah. For what? For what? I --

. . .

Det. Wenhart: Right. Well, here's the thing, is you are detained, which means that you are in custody. It does not necessarily mean arrest, it just means in custody. And the reason you're in custody is because you have been identified, you do have some injuries that are consistent with what's went on --

[defendant]: What injuries?

. . .

[Det. Wenhart]: Okay. Well, you got some scratches. You got some blood on you. You got some other -- so anyway.

So there is some allegations of that. So this is your opportunity to tell your side of the story.

. . .

[defendant]: [W]hat the hell do you want me to say?

. . .

[Det. Wenhart]: [W]ell, we'll get to that. But you got to let me finish explaining what's going on, okay?

. . .

[Det. Wenhart]: This is what I have to do. I have to advise [you of] your rights. And then I'm gonna ask you some questions.

[defendant]: Man, I –

[Det. Wenhart]: Listen -- listen -- listen -- listen -- listen to me.

[defendant]: I'm intoxicated. I'm -- I'm just –

[Det. Wenhart]: Mr. Knight. Mr. Knight. Mr. Knight.

[defendant]: Some bullshit, bro.

. . .

[Det. Wenhart]: If I were taking one person at their word, would I need to sit here and talk to you and find out what–

[defendant]: Why are you even talking to me?

. . .

[Det. Wenhart]: Because I want your side of the story as to what happened tonight.

. . .

[defendant]: I have no story to tell.

. . .

[defendant]: See, that's the thing right there I don't understand. What the hell am I doing in these damn cuffs, man?

[Det. Wenhart]: Well, if you want me to explain that, you got to allow me to get through here. Okay?

. . .

[Det. Wenhart]: You must understand your rights.

At this point in the interrogation, Detective Wenhart *Mirandized* defendant. When asked if he understood each of the rights that were explained to him, defendant went on the following rant:

> [defendant]: I -- not really. I'm --
>
> [Det. Wenhart]: Well --
>
> [defendant]: I'm -- I'm not gonna lie to you, man. I'm -- I'm -- I'm -- I'm serious. See, this is where I'm at now.
>
> [Det. Wenhart]: Uh-huh?
>
> [defendant]: (Inaudible) I'm gonna be frank with you. This is exactly where I'm at. I haven't did anything wrong, man.
>
> [Det. Wenhart]: Uh-huh.
>
> [defendant]: Not a damn thing. You see what you see. I don't care. But I haven't did any damn thing wrong. I haven't harmed anybody, I haven't did anything to anybody. . . .
>
> [Det. Wenhart]: Okay.
>
> [defendant]: Other than that right there, I don't know what the hell you talking about.

Defendant then proceeded to answer Detective Wenhart's questions regarding, *inter alia*, the sexual assault under investigation, the scratches on defendant's nose and cheek, and the nature of his relationship with T.H. Throughout the interview, defendant denied having any sexual contact with T.H., stating at one point, "Bro, it never happened."

As noted above, both parties revisited issues regarding the interview's admissibility before the State called Detective Wenhart to testify at defendant's second trial. Consequently, Judge Hill conducted a *voir dire* hearing on defendant's motion to suppress the video. After considering the arguments of counsel and reviewing the video, the trial court determined that the central issues of contention were whether defendant understood his *Miranda* rights and whether his conduct during the interview established an implied waiver of those rights. In regards to those issues, the trial court made the following oral findings of fact:

> Defendant immediately said are you arresting me? At that time defendant was . . . handcuffed to the wall, was clearly detained, and yet the reading of the rights triggered in the defendant's mind that this was an arrest, which to the Court provides some indication of [defendant's knowledge about] *Miranda*. . . .
>
> Defendant has a prior [felony] criminal history . . ., so [he has] some knowledge and familiarity with the criminal justice system. . . . Clear language was used here. . . . [D]efendant's statement was not equivocal in saying no, I do not, really in response to whether he understood his rights. . . . [T]he nature of the discussion prior to the full reading of the rights made it clear that . . . defendant was seeking information about what had happened here and wanted to provide information with regard to . . . what had been done here, indicating . . . defendant['s willingness] to [talk] and actually [say] to [Detective Wenhart] I want to be frank with you, I want to explain this to you.

Judge Hill also found that defendant was an adult in his thirties with no indication of cognitive problems. Based on these findings, Judge Hill concluded as a matter of law that defendant "understood his [*Miranda*] rights" and that "through his continued discussion [with law enforcement,]" he voluntarily and impliedly waived those rights in providing a statement to Detective Wenhart.

On appeal, defendant challenges the trial court's legal conclusion that he knowingly and impliedly waived his *Miranda* rights. The essence of this argument is that Judge Hill's findings do not support her conclusion that defendant understood his rights.

"Our review of a trial court's denial of a motion to suppress is strictly limited to determining whether the trial court's underlying findings of fact are supported by competent evidence, and whether those factual findings in turn support the trial court's ultimate conclusions of law." *State v. Robinson*, 221 N.C. App. 509, 517-18, 729 S.E.2d 88, 96 (2012) (citation omitted). "[T]he trial court's findings of fact after a *voir dire* hearing concerning the admissibility of a [defendant's custodial statement] are conclusive and binding on [this Court] if supported by competent evidence." *State v. Simpson*, 314 N.C. 359, 368, 334 S.E.2d 53, 59 (1985) (citations omitted). However, the trial court's legal conclusion that defendant's statement was knowingly, intelligently, and voluntarily made is fully reviewable on appeal. *Id.*

The Fifth Amendment to the United States Constitution protects a person from being compelled to be a witness against himself in a criminal case. U.S. Const. amend. V. This privilege against self-incrimination "is made applicable to the states by the Fourteenth Amendment." *State v. Richardson*, 226 N.C. App. 292, 299, 741 S.E.2d 434, 440 (2013). In *Miranda*, the United States Supreme Court decreed that statements obtained from a suspect during custodial interrogation are presumed to be compelled in violation of the Fifth Amendment's Self-Incrimination Clause and are thus inadmissible in the State's case-in-chief. 384 U.S. 436, 457-58, 16 L.Ed.2d 694, 713-14 (1966). Under *Miranda*, "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Id.* at 444, 16 L. Ed. 2d at 706. These safeguards include warning a criminal suspect being questioned that he "has the right to remain silent, that anything he says can be used against him in a court of law, [and] that he has the right to the presence of an attorney," either retained or appointed. *Id.* at 479, 16 L. Ed. 2d at 726.

However, since *Miranda*'s main protection lies in advising defendants of their rights[,]" *Berghuis v. Thompkins*, 560 U.S. 370, 385, 176 L. Ed. 2d 1098, 1113 (2010), once its procedural safeguards are properly in place, a statement is not presumptively compelled if the suspect voluntarily, knowingly, and intelligently waives his privilege against self-incrimination. *State v. Simpson*, 314 N.C. 359, 367, 334 S.E.2d 53, 59 (1985); *Miranda*, 384 U.S. at 444, 16 L. Ed. 2d at 707. A valid waiver of *Miranda* rights involves two distinct components: the waiver (1) must be given voluntarily and (2) must be knowingly and intelligently made. *Colorado v. Spring*, 479 U.S. 564, 573, 93 L. Ed. 2d 954, 965 (1987). In assessing voluntariness, the issue is whether the defendant's statement "was the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Moran v. Burbine*, 475 U.S. 412, 421, 89 L. Ed. 2d 410, 421 (1986). In assessing the knowing and intelligent requirements, "the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Id.* When a suspect makes a statement after the required warnings have been given, the State bears the burden of demonstrating by a preponderance of the evidence that the suspect knowingly and intelligently waived his Fifth Amendment privilege. *State v. Thibodeaux*, 341 N.C. 53, 58, 459 S.E.2d 501, 505 (1995). "Whether a waiver is knowingly and intelligently made depends on the specific facts and circumstances of each case, including the background, experience, and conduct of the accused." *Simpson*, 314 N.C. at 367, 334 S.E.2d at 59.

"Only if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." *Moran*, 475 U.S. at 421, 89 L. Ed. 2d at 421 (citations omitted) (italics added).

"To effectuate a waiver of one's *Miranda* rights, a suspect need not utter any particular words." *Burket v. Angelone*, 208 F.3d 172, 198 (4th Cir. 2000) (citation omitted). A waiver can be expressly made or implied, based on the words and actions of the person interrogated. *Berghuis*, 560 U.S. at 384, 176 L. Ed. 2d at 1112 ("[A] waiver of *Miranda* rights may be implied through "the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver." (citation omitted)).

The voluntariness of the waiver is not at issue here. Instead, defendant argues that the State's failure to prove he understood his rights fatally undermined any waiver he may have given.

Some of the circumstances established by the evidence indicate that defendant understood and properly waived his *Miranda* rights. At the time of questioning, defendant was thirty-eight years old. There was nothing particularly unusual about defendant's behavior. He was alert. Defendant appeared to understand the questions posed by Detective Wenhart, and as a general matter, he responded appropriately. Even after stating he was "intoxicated," defendant responded to questioning coherently and logically. Despite aggressively contesting all charges against him, defendant never appeared confused by the questions asked. Although defendant specified that he did not understand "what the hell [he] was doing in these damn cuffs," that statement was apparently made to support his proclamation of innocence. Throughout the interview, defendant was unintimidated and responsive; and he never requested that the interview be stopped.

Defendant had also been previously convicted of numerous misdemeanor charges. In terms of defendant's general awareness regarding the import of his detention, he interrupted Detective Wenhart's first attempt to *Mirandize* him, stating, "If you're reading my rights, I'm under arrest." Detective Wenhart then clearly explained to defendant that "when we read somebody their rights it doesn't mean they're under arrest." In most cases, these facts would support findings that defendant understood his *Miranda* rights, and knowingly and intelligently waived them. However, given the circumstances of this case, the aforementioned facts do not suffice.

Specifically, there is no persuasive evidence that defendant actually understood his *Miranda* rights. Once a *Miranda* warning has been given and a suspect makes an uncoerced statement, "[t]he prosecution must make the additional showing that the accused understood these rights" in order to establish a valid waiver. *Berghuis*, 560 U.S. at 384, 176 L. Ed. 2d at 1112. An understanding of rights and an intention to waive them, therefore, are two entirely different matters, and the former must be proven before the latter can be properly established.

We recognize that "[p]rior experience with the criminal justice system is an important factor in determining whether . . . defendant made a knowing and intelligent waiver." *State v. Brown*, 112 N.C. App. 390, 396-97, 436 S.E.2d 163, 167 (1993). However, while defendant had been arrested many times previously, there is no direct evidence that he was *Mirandized* on those occasions. Even assuming defendant received *Miranda* warnings during prior arrests, the record contains no evidence that he demonstrated an understanding of his rights on previous occasions. Prior experience with the criminal justice system is relevant, but it is not sufficient to prove that defendant previously received *Miranda* warnings and understood them.

In addition, the trial court's findings that defendant had no cognitive impairment and that Detective Wenhart issued the *Miranda* warnings using "clear language" do not support its ruling. Just because defendant appeared to have no mental disabilities does not mean he understood the warnings expressly mandated by *Miranda*. As to the "clear language" finding, defendant argues "understanding your *Miranda* rights requires not just knowing each right individually, but knowing how the invocation of one right can impact your ability to exercise another right." To the extent defendant argues that suspects must have plenary knowledge of their *Miranda* rights before waiving them, he is simply wrong. "The Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege." *Spring*, 479 U.S. at 574, 93 L. Ed. 2d at 966. Even so, defendant correctly asserts that the State failed to prove he had a basic understanding of the *Miranda* warnings, the principal purpose of which "is to ensure that an accused is advised of and understands the right to remain silent and the right to counsel." *Berghuis*, 560 U.S. at 383, 176 L. Ed. 2d at 1112. We find no indication that defendant understood he did not have to speak with Detective Wenhart, and that he could request counsel.

Finally, when asked if he understood his rights, defendant replied, "I -- not really. I'm -- I'm not going to lie to you, man. I'm -- I'm -- I'm -- I'm serious. See this is where I'm at now. I'm gonna be frank with you. This

is exactly where I'm at. I haven't did anything wrong, man." We agree with the trial court that defendant was not indicating confusion as to his rights. Rather, taken in context, defendant's response showed that he was indignant about being hauled into the police station because, in his view, he had not done anything wrong. Nonetheless, there is no evidence that defendant ever acknowledged understanding his rights. Though Detective Wenhart repeatedly stressed that defendant had to "understand [his] rights," defendant never made any kind of affirmative response to those admonitions. In order for the State to prevail on the waiver issue, little was required to demonstrate an acknowledgment of understanding. Defendants have used the colloquialism "MmMumm," *Yang v. Cate*, 2011 WL 3503211, at *13 (E.D. Cal.), and even a nod of the head, *People v. Crane*, 145 Ill. 2d 520, 530, 585 N.E.2d 99, 103 (1991), to acknowledge their rights and give intelligent waivers. The Seventh Circuit has held that a defendant's "experience and eagerness to strike a deal" with law enforcement after answering a few questions made it clear that he "understood his rights and thought he might benefit from waiving them." *United States v. Brown*, 664 F.3d 1115, 1118 (7th Cir. 2011). And in *Burket*, the Fourth Circuit held that a defendant's willingness "to speak with [law enforcement], coupled with his *acknowledgment that he understood* his *Miranda* rights, constituted an implied waiver of [those] rights." 208 F.3d at 198 (emphasis added) (citing *United States v. Frankson*, 83 F.3d 79, 82 (4th Cir. 1996)) ("[A] defendant's subsequent willingness to answer questions after acknowledging his *Miranda* rights is sufficient to constitute an implied waiver." (citation and internal quotation marks omitted)). As a constitutional minimum, the State had to show that defendant intelligently relinquished a known and understood right. *Patterson v. Illinois*, 487 U.S. 285, 292, 101 L. Ed. 2d 261, 272 (1988). Here, defendant exhibited a willingness to answer questions after being *Mirandized*, but he never acknowledged his rights; nor did he engage in behavior that demonstrated a true awareness of them. As such, there is no persuasive evidence that defendant actually understood his right to remain silent and right to counsel.

All told, the "knowing and intelligent" waiver requirement implies that a choice to abandon one's rights must be based upon some appreciation of that decision's consequences. In other words, a factual understanding of the rights at issue must come together with an appreciation of the relevance of those rights in the context of an unfolding interrogation. The Constitution does not require that a suspect understand the full import of custodial interrogation, but before a waiver of rights can be intelligently made, one must understand both the basic privilege guaranteed by the Fifth Amendment and the consequences of speaking

freely to law enforcement officials. In the instant case, the State presented sufficient evidence of an implied waiver, but it did not show that defendant had a meaningful awareness of his *Miranda* rights and the consequences of waiving them. Because the State failed to make "the additional showing" by a preponderance of the evidence that defendant understood his rights, we conclude that he did not waive them intelligently. *Berghuis*, 560 U.S. at 384, 176 L. Ed. 2d at 1112. Accordingly, the trial court's findings do not support its ruling that defendant gave a valid waiver of rights and the court erred by denying his motion to suppress the videotaped interview. Our decision is not based on any particular disagreement with Judge Hill as to the facts found, but on a differing legal evaluation of them.

Because the trial court's ruling infringed "upon . . . defendant's constitutional rights[, the error] is presumed to be prejudicial[.]" *State v. Brown*, 306 N.C. 151, 164, 293 S.E.2d 569, 578 (1982). Unless the State proves the trial court's erroneous admission of defendant's custodial statement was harmless beyond a reasonable doubt, he is entitled to a new trial. *Id.*; N.C. Gen. Stat. § 15A-1443(b) (2013). "The test is whether, in the setting of this case, we can declare . . . that there is no reasonable possibility the [erroneously admitted evidence] might have contributed to the conviction." *State v. Castor*, 285 N.C. 286, 292, 204 S.E.2d 848, 853 (1974). For the following reasons, the State has met its burden.

In the videotape shown to the jury, defendant never confessed to the crimes for which he was tried. Rather, he adamantly proclaimed his innocence and belligerently contested T.H.'s allegations. In *State v. Council*, the trial court's erroneous admission of the defendant's custodial statements was found to be harmless beyond a reasonable doubt when the only "comments [he] made which could be viewed as even possibly inculpatory were: (1) wondering whether he 'might do 5 to 7' years in prison (presumably a reference to the possible consequences of his arrest), (2) an admission that he had seen and narrowly avoided police officers the night before, (3) an expression that he had intended to stay 'on the run' as long as possible, and (4) a question about why police had described him as 'armed and dangerous.' " ___ N.C. App. ___, ___, 753 S.E.2d 223, 231, *review denied*, 367 N.C. 505, 759 S.E.2d 101 (2014). Similarly here, our review of the video and transcript of defendant's statement reveals few, if any, comments that could be viewed as inculpatory. If the defendant's statement in *Council*—which included references to potential jail time and staying "on the run"—was not particularly prejudicial, the same holds true for defendant's statement in this case.

Moreover, there was overwhelming evidence of defendant's guilt on the rape charge. In addition to T.H.'s detailed testimony, the State presented evidence of prior statements T.H. made to police officers and a sexual assault nurse examiner shortly after the incident with defendant occurred. When he was arrested, defendant had T.H.'s cell phone in his possession and he lied to law enforcement regarding the reason he was at the gas station. Defendant had scratches on his nose and cheek, fresh blood on his shirt, and a strand of hair consistent with the color of T.H.'s head hair on his cheek. When officers entered T.H.'s home to investigate, they found her bed covers in disarray, and her pants and panties were inside out on the bedroom floor. Subsequent chemical testing revealed the presence of defendant's DNA on T.H.'s panties, bed sheet, and comforter. Significantly, while being detained in Wake County jail, defendant made several phone calls to Leicht and another to Ryan Knight ("Ryan") in which he gave conflicting accounts about what happened with T.H. Defendant told Leicht the charges against him were "bullsh**." However, in his conversation with Ryan, defendant stated that T.H was "fu**ing" with him all night; he thought she was going to give him some "pu**y];]" and he was getting ready to put his "d**k" in her when she decided to holler rape, prompting defendant to "let the b**ch go."

Despite the foregoing evidence, defendant insists that because the jury at his 2013 trial did not view his videotaped statement and "hung on the kidnapping, rape, and sexual offense charges[,]" he was prejudiced when the jury at his 2014 trial viewed the videotape and subsequently convicted him of rape and kidnapping. Defendant also contends that when the videotape was erroneously admitted at his 2014 trial, he was "all but forced" to testify, something he did not do at his 2013 trial. We view this as pure speculation. Although defendant asserts that he *had* to take the stand at his retrial to "clarify any unresolved factual issues created by the videotape[,]" he fails to state what those factual issues were. Quite simply, defendant had a choice to either testify in his own defense during his 2014 retrial or simply refuse to do so. He chose the former.

Nevertheless, the dissent agrees with defendant's reasoning, and adds that because defendant testified at his 2014 trial, the State was able to impeach him with prior convictions, including an August 2013 conviction of assault on a female which arose from the same incident with T.H. Defendant's credibility, however, had already been significantly impugned *before* the prior conviction evidence was presented. Indeed, the State used defendant's statement to Detective Wenhart to impeach defendant's trial testimony on several points. "A statement taken in violation of a defendant's *Miranda* rights may nonetheless be used to

impeach the defendant's credibility if (1) the statement was not involuntary, and (2) the defendant testified at trial." *State v. Purdie*, 93 N.C. App. 269, 279, 377 S.E.2d 789, 795 (1989) (citing *Harris v. New York*, 401 U.S. 222, 224, 28 L. Ed. 2d 1, 4 (1971)). Since the above criteria were met in this case, the cross-examination questions of defendant regarding his statement were proper. *Id.* at 279-80, 377 S.E.2d at 795; *Harris*, 401 U.S. at 225-26, 28 L. Ed. 2d at 4-5; *State v. Stokes*, 357 N.C. 220, 226, 581 S.E.2d 51, 55 (2003). Consequently, the State had already questioned and damaged defendant's character for truthfulness by the time it chose to utilize the prior conviction evidence.

In sum, defendant essentially argues that "history repeats itself," and he asks us to assume that all other factors—the jury's makeup, the effect of the testimony, the lawyering, etc.—relevant to the outcome of his 2013 and 2014 trials were the same except for the erroneous admission of his statement, which supposedly forced him to testify the second time around. We reject this argument. Our Supreme Court has noted that "[o]rdinarily, where a confession made by the defendant is erroneously admitted into evidence, we cannot say beyond a reasonable doubt that the erroneous admission of the confession did not materially affect the result of the trial to the prejudice of the defendant." *State v. Siler*, 292 N.C. 543, 552, 234 S.E.2d 733, 739 (1977). Here, there was no confession. Quite the opposite occurred. Since the videotaped statement did not inculpate defendant on any charges, and the State presented overwhelming evidence on the rape charge, we conclude, beyond a reasonable doubt, that the outcome of defendant's trial would have been the same even if the videotape had been suppressed. *See State v. Greene*, 324 N.C. 1, 12, 376 S.E.2d 430, 438 (1989) (holding that, even assuming error, admission of the defendant's statement was harmless beyond a reasonable doubt because the "statement d[id] nothing to inculpate [the] defendant and [was] not probative of his guilt or innocence"), *vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990).

C. Judge Hill's Denial of Defendant's Motion to Dismiss the First Degree Kidnapping Charge

[3] Finally, defendant argues the trial court erred by denying his motion to dismiss the first degree kidnapping charge because there was insufficient evidence that the confinement and restraint of T.H. was separate and apart from the rape. In making this argument, defendant insists that, "because the indictment alleged that [he] confined *and* restrained T.H. for the purpose of facilitating the forcible rape, the State . . . had to prove *both* confinement *and* restraint" to support the kidnapping charge. Once again, we disagree.

As an initial matter, we note that defendant incorrectly asserts the State bore the burden of proving both confinement and restraint to support the kidnapping charge. Kidnapping is a specific intent crime, and the State had to prove that defendant unlawfully restrained, confined, or removed T.H. "for one of the specified purposes outlined in the statute." *State v. Moore*, 315 N.C. 738, 743, 340 S.E.2d 401, 404 (1986). "Since an indictment need only allege one statutory theory, an indictment alleging all three theories is sufficient and puts the defendant on notice that the State intends to show that the defendant committed kidnapping in any one of the three theories." *State v. Lancaster*, 137 N.C. App. 37, 48, 527 S.E.2d 61, 69 (2000). Here, the indictment alleged that defendant restrained and confined T.H. to facilitate the commission of a felony, forcible rape. As a result, either one of those theories—restraint *or* confinement—could serve as the basis for the jury's finding on the kidnapping charge.

In terms of ruling on a motion to dismiss for insufficiency of the evidence, our Supreme Court

> has held that . . . the trial court must consider the evidence in the light most favorable to the State and give the State every reasonable inference to be drawn therefrom. The State is required to present substantial evidence for each element of the offense charged. The trial court must consider all evidence presented that is favorable to the State. If there is substantial evidence, either direct or circumstantial, that the defendant committed the offense charged, then a motion to dismiss is properly denied.

State v. Gainey, 355 N.C. 73, 89, 558 S.E.2d 463, 474 (2002) (citations omitted). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Vick*, 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995).

Any person "who, without consent, unlawfully confines, restrains, or removes someone sixteen years of age or older shall be guilty of kidnapping when it is done for the purpose of facilitating commission of a felony." *State v. Parker*, ____ N.C. App. ____, 768 S.E.2d 1, 2 (2014); N.C. Gen. Stat. § 14-39(a)(2) (2013). Kidnapping becomes a first degree offense when a kidnapping victim is sexually assaulted. N.C. Gen. Stat. § 14–39(b) (2013). As used in subsection 14-39(a), the term "confine" means "some form of imprisonment within a given area, such as a room, a house or a vehicle." *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978). The term "restraint" includes confinement, but also means

"restriction, by force, threat or fraud, without a confinement. Thus, one who is physically seized and held . . . or who, by the threatened use of a deadly weapon, is restricted in his freedom of motion, is restrained within the meaning of this statute." *Id.*

However, "[i]t is self-evident that certain felonies (e.g., forcible rape and armed robbery) cannot be committed without some restraint of the victim." *Id.* To support a conviction on charges of both rape and kidnapping, "the restraint [or confinement], which constitutes the kidnapping, [must be] a separate, complete act, independent of and apart from the other felony." *Id.* at 524, 243 S.E.2d at 352. "[A] person cannot be convicted of kidnapping when the only evidence of restraint [or confinement] is that 'which is an inherent, inevitable feature' of another felony such as [rape]." *State v. Beatty*, 347 N.C. 555, 559, 495 S.E.2d 367, 369 (1998) (quoting *Fulcher*, 294 N.C. at 523, 243 S.E.2d at 351).

In determining whether the restraint in a particular case is sufficient to support a kidnapping charge,

> [t]he court may consider whether the defendant's acts place the victim in greater danger than is inherent in the other offense, or subject the victim to the kind of danger and abuse that the kidnapping statute was designed to prevent. The court also considers whether defendant's acts "cause additional restraint of the victim or increase the victim's helplessness and vulnerability."

State v. Key, 180 N.C. App. 286, 290, 636 S.E.2d 816, 820 (2006) (citations omitted).

Here, "the commission of the underlying felony of rape did not require [defendant] to separately restrain or remove" T.H. from her living room couch to her bedroom. *Key*, 180 N.C. App. at 291, 636 S.E.2d at 821. T.H. demonstrated defendant's size relative to her own by describing him as "a body builder." In addition, when defendant abruptly picked T.H. up off of her couch, he immobilized her arms and lifted her feet off the ground. By way of this restraint, defendant gained full control of T.H. in her living room and could have raped her there, but instead, he chose to carry T.H. through her home and commit the rape in her bedroom. *See State v. Blizzard*, 169 N.C. App. 285, 290, 610 S.E.2d 245, 250 (2005) ("Asportation of a rape victim is sufficient to support a charge of kidnapping if the defendant could have perpetrated the offense when he first threatened the victim, and instead, took the victim to a more secluded area to prevent others from witnessing or hindering the rape."). Such movement and restraint constituted "a separate and independent act"

not inherent to the rape in this case. *Key*, 180 N.C. App. at 291, 636 S.E.2d at 821.

When defendant removed T.H. from her living room to her bedroom, he also "increase[d her] helplessness and vulnerability." *Id.* at 290, 636 S.E.2d at 820. Specifically, when defendant was carrying T.H. through the kitchen, she began screaming, well-aware that both the front and back doors to her home were open. Once in the bedroom, T.H.'s chance of successfully attracting the attention and help of neighbors was significantly decreased. When viewed in the light most favorable to the State, the evidence was sufficient to establish that defendant, by physically seizing and restraining T.H. before carrying her away from open exterior doors and into the bedroom, facilitated his ability to commit the rape and "exposed [T.H.] to a greater degree of danger than that which is inherent in [rape]." *State v. Ripley*, 360 N.C. 333, 340, 626 S.E.2d 289, 294 (2006). Accordingly, the trial court properly denied defendant's motion to dismiss the kidnapping charge.

III. Conclusion

When Judge Young declared a mistrial on the charges of kidnapping, rape, and sexual assault at defendant's 2013 trial, his suppression ruling had no binding legal effect. Neither the doctrine of collateral estoppel nor the rule that one Superior Court judge cannot overrule another applied to this ruling. As such, Judge Hill was free to rule anew on the suppression issue. Moreover, while the admission of defendant's videotaped statement at his 2014 trial was in violation of *Miranda*, the trial court's error did not prejudice defendant as it was harmless beyond a reasonable doubt. Finally, there was sufficient evidence to support defendant's conviction for first degree kidnapping.

NO PREJUDICIAL ERROR.

Judge TYSON concurs.

Judge STROUD concurs in part and dissents in part.

STROUD, Judge, concurring in part and dissenting in part.

I concur with the majority opinion on the first, second, and fourth issues addressed but dissent based upon the third issue. Because I believe that the State has failed to demonstrate that the erroneous admission of defendant's videotaped statement was harmless beyond a reasonable doubt, I would grant defendant a new trial.

The majority found that the trial court erred in denying defendant's motion to suppress, and I agree. Yet the majority finds that this error was harmless beyond a reasonable doubt based upon the fact that in the videotaped statement, defendant did not "confess" to the crime and in light of the other evidence, including physical evidence, of defendant's guilt.

> To find harmless error beyond a reasonable doubt, we must be convinced that there is no reasonable possibility that the admission of this evidence might have contributed to the conviction. In deciding whether a reasonable possibility exists that testimony regarding a defendant's request for counsel contributed to his conviction, the lynchpin in our analysis is whether other overwhelming evidence of guilt was presented against defendant.

State v. Rashidi, 172 N.C. App. 628, 639, 617 S.E.2d 68, 76 (citations and quotation marks omitted), *aff'd per curiam*, 360 N.C. 166, 622 S.E.2d 493 (2005).

I agree that the evidence against defendant is strong, but I am not convinced that the State has demonstrated that the error was harmless beyond a reasonable doubt. The first jury considered the same physical evidence, the same witnesses, and the same jail phone conversations as the second jury but was unable to reach a verdict on any charge other than the assault on a female charge, so they did have doubt as to the other charges. The second jury considered the same evidence but also considered the erroneously admitted videotape and defendant's own testimony. Defendant argues that he did not testify at the first trial, but was "all but forced" to testify at the second trial "to clarify any unresolved factual issues created by the videotape." The majority views the effect of the erroneous admission of the videotaped interview on defendant's decision to testify as "pure speculation[,]" but given the first jury's inability to reach a verdict on the relevant charges, I disagree. I also note that even the second jury did not convict defendant of all of the charges against him, as they found him not guilty of the second-degree sexual offense, despite the "overwhelming" evidence as to all of the charges. And because defendant testified in the second trial, the State was able to impeach him with evidence of his prior convictions. Only the second jury learned of these convictions, and although the jury was instructed to consider them only as to defendant's credibility, these convictions had the potential to be particularly prejudicial. One of the prior convictions was defendant's 8 August 2013 conviction of assault on a female, which arose from the same incident with T.H., since this was the one charge upon which the first jury was able to reach a verdict. The second

jury also learned that he had been convicted of assault on a female on 30 June 2004 and driving while impaired on 3 June 2005.

The majority notes that at the second trial, defendant's credibility had already been "significantly impugned" even before the jury heard evidence of his prior convictions, referring to his cross-examination regarding inconsistencies between what he told Detective Wenhart and his trial testimony. To me, this argument seems circular. Defendant would not have been testifying *at all* but for the erroneous admission of the evidence, and he would not have been subject to cross-examination upon the statement taken in violation of his *Miranda* rights if he had not testified. I also disagree that this cross-examination "significantly impugned" defendant, since the questioning simply pointed out minor variations between what defendant told Detective Wenhart and what defendant said in court. Defendant also testified that he was intoxicated when he was talking to the detective. In fact, defendant's apparent confusion and lack of demonstrated understanding of his *Miranda* rights—perhaps arising at least in part from his intoxication—at this interview are part of the reason that the majority holds that defendant did not understand or intelligently waive his *Miranda* rights. Holding that the use of defendant's statement, which should have been suppressed, was not harmless beyond a reasonable doubt, and then relying upon the very same evidence to demonstrate that defendant had already been impeached, so that more impeaching evidence would not further harm him, seems logically inconsistent to me. This impeachment came from the very statement to Detective Wenhart that defendant had sought unsuccessfully before the trial court to suppress—and the majority here has held should have been suppressed—and which was the reason that defendant believed that he must testify in the second trial. In other words, but for the erroneous admission of the statement evidence, *none* of the impeaching evidence, neither the cross-examination upon defendant's erroneously admitted statement nor the prior convictions, would have been considered by the second jury. In this situation, I am simply not "convinced" that "there is no reasonable possibility that the admission of this evidence might have contributed to the conviction[s]." *See id.*, 617 S.E.2d at 76. I therefore concur in part and dissent in part, and would grant defendant a new trial.

STATE OF NORTH CAROLINA
v.
XAVIER DONNELL SELLERS, DEFENDANT

No. COA15-534

Filed 16 February 2016

Appeal and Error—preservation of issues—shackled defendant—statutory claim

There was no error in a prosecution for assault with a deadly weapon inflicting serious injury where defendant walked to the witness stand in shackles in front of the jury. There was no request for a limiting instruction, no motion for a mistrial, and defendant's appeal only raised a statutory claim under N.C.G.S. § 15A-1031, which he had waived. Nevertheless, trial court judges should be aware that shackling defendant during trial can, under the proper circumstances, result in a failure of due process.

Appeal by Defendant from judgment entered 10 April 2015 by Judge Nathaniel J. Poovey in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 November 2015.

Attorney General Roy Cooper, by Assistant Attorney General Lareena J. Phillips, for the State.

Jarvis John Edgerton, IV, for Defendant-Appellant.

HUNTER, JR., Robert N., Judge.

Xavier Donnell Sellers ("Defendant") appeals following a jury verdict convicting him of assault with a deadly weapon inflicting serious injury. Following the verdict, the trial court sentenced Defendant to 55 to 78 months imprisonment. On appeal, Defendant argues the trial court erred by failing to comply with the provisions of N.C. Gen. Stat. § 15A-1031. Because Defendant waived this issue at trial, we find no error.

I. Factual and Procedural Background

On 23 September 2013, a Mecklenburg County grand jury indicted Defendant for assault with a deadly weapon inflicting serious injury, communicating threats, and assault on a female. The State gave Defendant notice that it sought to prove aggravating factors. Defendant pled not guilty, and the case was called for trial 7 April 2014.

The State presented evidence on 8 April 2014, and called Shalamar Venable as its first witness. Thereafter, the State put on additional witnesses and evidence. At the close of the State's case, the trial court dismissed the charges for assault on a female and communicating threats. Thereafter, Defendant informed the court that he would testify. The transcript[1] reveals the following:

> BAILIFF: Your Honor, do you want him to be in front of the jury—they're going to know he's got leg restraints on.
>
> THE COURT: What do you want to do about that?
>
> BAILIFF: He's done it three times.
>
> THE COURT: [Defense counsel], what do you say?
>
> [DEFENSE COUNSEL]: I don't object to him walking up there.
>
> THE COURT: Even with leg restraints on?
>
> [DEFENSE COUNSEL]: No, sir.
>
> THE COURT: You might ask him—it might be part of your defense. Let's just let him walk up in front of the jury. . . .
>
> [The jury returns to the courtroom]
>
> THE COURT: Will there be evidence for the defendant?
>
> [DEFENSE COUNSEL]: Yes, sir. We call [Defendant].
>
> THE COURT: Sir, come on up. Step around to the witness box, please. Once there, place your left hand on the Bible, raise your right, and face the jury.

Defendant walked in front of the jury with leg shackles on, and testified he acted in self-defense. Defendant did not object at any time. Neither party requested a jury instruction regarding the leg shackles, and neither party moved for mistrial.

On 10 April 2014, the jury returned a unanimous verdict finding Defendant guilty of assault with a deadly weapon inflicting serious injury. The court sentenced Defendant in the aggravated range to 55 to 78 months imprisonment. Defendant timely gave his oral notice of appeal.

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1. The parties agree the record is silent on whether Defendant was shackled prior to this exchange. However, the bailiff clearly indicated Defendant was in leg shackles prior to this exchange, and the jury saw Defendant's shackles on three prior occasions.

II. Analysis

"The law has long forbidden routine use of visible shackles during the guilt phase [of trial]; it permits a State to shackle a criminal defendant only in the presence of a special need." *Deck v. Missouri*, 544 U.S. 622, 626 (2005). "[T]he Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." *Id.* at 629. "Thus, where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation." *Id.* at 635. "The State must prove 'beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained.' " *Id.* (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)).

Defendant contends the trial court violated N.C. Gen. Stat. § 15A-1031 by allowing him to appear before the jury in leg shackles, and failing to issue a limiting instruction. Our Supreme Court, and this Court, held that failure to object to shackling waives "any error which may have been committed." *State v. Tolley*, 290 N.C. 349, 371, 226 S.E.2d 353, 370 (1976); *see also State v. Thomas*, 134 N.C. App. 560, 568, 518 S.E.2d 222, 228 (1999); *State v. Ash*, 169 N.C. App. 715, 726, 611 S.E.2d 855, 863 (2005).[2] Even though these opinions were published prior to the United States Supreme Court decision in *Deck v. Missouri*, we must hold Defendant waived his shackling challenge.

"It is not the duty of this Court to supplement an appellant's brief with legal authority or arguments not contained therein." *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 606, 615 S.E.2d 350, 358, *disc. review denied*, 360 N.C. 63, 623 S.E.2d 582 (2005). However, we note a paradox in the law.

"Visible shackling undermines the presumption of innocence and the related fairness of the fact finding process." *Deck*, 544 U.S. at 630 (citation omitted). Under current North Carolina law, other structural errors similar to shackling are not preserved without objection at trial, and are waived on appeal. *See State v. Garcia*, 358 N.C. 382, 410, 597 S.E.2d 724, 745 (2004). Defendant's appeal only raises a statutory claim under N.C. Gen. Stat. § 15A-1031, which he waived.

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2. There are other unpublished opinions from our Court that uphold this waiver principle. *See e.g. State v. Anthony*, ___ N.C. App. ___, 759 S.E.2d 712 (2014) (unpublished); *State v. McDonald*, 196 N.C. App. 791, 675 S.E.2d 719 (2009) (unpublished); *State v. Black*, 163 N.C. App. 611, 594 S.E.2d 258 (2004) (unpublished).

Nevertheless, trial judges should be aware that a decision by a sheriff to shackle a problematic criminal defendant in a jail setting or in transferring a defendant from the jail to a courtroom, is not, without a trial court order supported by adequate findings of fact, sufficient to keep a defendant shackled during trial. Failure to enter such an order can, under the proper circumstances, result in a failure of due process. *Deck*, 544 U.S. 622.

III. Conclusion

For the foregoing reasons we hold Defendant waived his statutory challenge. Therefore, we hold there is

NO ERROR.

Judges GEER and DILLON concur.

CYNTHIA WALKER, D.D.S., PETITIONER
v.
THE N.C. STATE BOARD OF DENTAL EXAMINERS, RESPONDENT

No. COA15-337

Filed 16 February 2016

1. Dentists—regulations—recording reasons for narcotic prescriptions

The N.C. State Board of Dental Examiners (Board) erred by enforcing against petitioner a "rule" requiring that records be kept of the reasons for prescribing narcotic pain medications. The Record Content Rule (Rule) does not require dentists to record a reason for the medications prescribed in their treatment records. However, petitioner did not establish that her substantial rights were prejudiced by the trial court's error regarding the Rule because the Board correctly found negligence in the same conduct.

2. Dentists—negligence—not recording reasons for narcotic prescriptions

The decision of the N.C. State Board of Dental Examiners (Board) that petitioner was negligent in the practice of dentistry was affirmed where petitioner was alleged to have failed to record her reasons for prescribing narcotic pain medications. The Board

did not exceed its statutory authority and its decision was not arbitrary and capricious.

Appeal by Petitioner from order entered 23 October 2014 by Judge Elaine Bushfan in Superior Court, Wake County. Heard in the Court of Appeals 21 September 2015.

Ryan McKaig for Petitioner-Appellant.

Carolin Bakewell for Respondent-Appellee.

McGEE, Chief Judge.

Cynthia Walker ("Petitioner") appeals from an order affirming the Final Agency Decision ("the Decision") of a panel of the North Carolina State Board of Dental Examiners ("the Board"). The Board concluded in its Decision that Petitioner had violated certain recordkeeping rules adopted by the Board and had been negligent in the practice of dentistry. We affirm.

I. Background

Petitioner has been licensed to practice dentistry in North Carolina since 1993. Petitioner was served with an Amended Notice of Hearing ("the Notice") by the Board on or around 25 April 2012. The Notice alleged, *inter alia*, that Petitioner had failed to properly document the reasons for prescribing narcotic pain medications for a number of patients in her treatment records. A hearing was held on this matter on 1–2 November 2012 ("the Board hearing"). The Board issued its Decision on 21 February 2013, and concluded that Petitioner had "violated the Board's rules and the standard of care for recordkeeping for narcotic pain medications prescribed for patients[,]" in violation of 21 N.C.A.C. 16T.101(a)(6)[1] ("the Record Content Rule") and N.C. Gen. Stat. § 90-41(a)(12), respectively. Petitioner filed a Petition for Judicial Review of the Decision on 21 March 2013. Following a hearing, the trial court denied Petitioner's petition and affirmed the Decision of the Board, in an order entered 23 October 2013 ("the order"). Petitioner appeals.

1. 21 N.C.A.C. 16T.101 was amended in 2015 and 21 N.C.A.C. 16T.101(a)(6) is currently codified at 21 N.C.A.C. 16T.101(f). *See* 30 N.C. Reg. 342 (3 August 2015) (Effective 1 July 2015).

II. Standard of Review

Judicial review of the final decision of an administrative agency in a contested case is governed by N.C. Gen. Stat. § 150B–51 (2013) in the North Carolina Administrative Procedure Act ("the APA"). The statute "governs both trial and appellate court review of administrative agency decisions." *N. C. Dept. of Correction v. Myers*, 120 N.C. App. 437, 440, 462 S.E.2d 824, 826 (1995), *aff'd per curiam*, 344 N.C. 626, 476 S.E.2d 364 (1996). Pursuant to N.C.G.S. § 150B–51(b), a reviewing court may

> reverse or modify the [final] decision [of an agency] if the substantial rights of the petitioner[ ] may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> . . .
>
> (2) In excess of the [agency's] statutory authority[;]
>
> . . .
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence . . . ; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

When the issue for review is whether an agency's decision was supported by "substantial evidence" or was "[a]rbitrary, capricious, or an abuse of discretion," this Court applies the "whole record" test. N.C.G.S. § 150B–51(c).

> A court applying the whole record test may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*. Rather, a court must examine all the record evidence — that which detracts from the agency's findings and conclusions as well as that which tends to support them — to determine whether there is substantial evidence to justify the agency's decision. Substantial evidence is defined as relevant evidence a reasonable mind might accept as adequate to support a conclusion.

Watkins v. N.C. State Bd. of Dental Exam'rs, 358 N.C. 190, 199, 593 S.E.2d 764, 769 (2004) (citations and quotation marks omitted). We review *de novo* the questions of whether a final agency decision

was made "[i]n excess of the [agency's] statutory authority" or was "[a]ffected by other error of law[.]" N.C.G.S. § 150B–51(c).

III. Violations

A. The Record Content Rule

[1] Petitioner contends the trial court erred by affirming the Board's conclusion that she had violated the Record Content Rule. Specifically, Petitioner argues that she did not violate the Record Content Rule because the rule does not require dentists to record a "reason" for the medications prescribed in their treatment records. We agree.

"Article [2a of the APA, N.C. Gen. Stat. §§ 150B-18–21.28 (2013), governs] . . . an agency's exercise of its authority to adopt a rule." *See* N.C.G.S. § 150B-18 (defining the "[s]cope and effect" of Article 2a). Pursuant to N.C.G.S. § 150B-18, "[a] rule is not valid unless it is adopted in substantial compliance with this Article." N.C.G.S. § 150B-18 was largely amended in 2011, *see* 2011 N.C. Sess. Laws 398, § 1, to further provide that

> [a]n agency shall not seek to implement or enforce against any person a policy, guideline, or other interpretive statement that meets the definition of a rule contained in [N.C.G.S. §] 150B-2(8a) if the policy, guideline, or other interpretive statement *has not been adopted as a rule in accordance with this Article.*

(emphasis added). N.C. Gen. Stat. § 150B-2(8a) (2013) defines a "rule" in this context, *inter alia*, as "any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly . . . or that describes the procedure or practice requirements of an agency."

The Record Content Rule provides that a dentist's treatment records must "include . . . [the] [n]ame and strength of any medications prescribed, dispensed or administered along with the quantity and date." Petitioner correctly notes that the plain language of the Record Content Rule creates no requirement that dentists record a "reason" for the medications prescribed in their treatment records. *See In re R.L.C.*, 361 N.C. 287, 292, 643 S.E.2d 920, 923 (2007) ("When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute[.]"); *see also Kyle v. Holston Grp.*, 188 N.C. App. 686, 692, 656 S.E.2d 667, 671 (2008) ("Our Supreme Court has applied the rules of statutory construction to administrative regulations

as well as statutes."). Accordingly, because a requirement that dentists record the "reason" for prescribing medications would constitute a "rule" under N.C.G.S. § 150B-2(8a), the Board erred by enforcing this "rule" against Petitioner without first adopting it in accordance with the APA. *See* N.C.G.S. §§ 150B-2(8a), -18. However, for the reasons stated *infra*, we believe this error did not "prejudice[ ]" the "substantial rights" of Petitioner and, therefore, does not warrant reversal of the order. *See* N.C.G.S. § 150B-51(b).

B. Negligence

[2] The Notice also alleged, and the Decision concluded, that Petitioner had been negligent in the practice of dentistry by not recording the reasons for prescribing certain narcotic pain medications to her patients. *See* N.C. Gen. Stat. § 90-41(a)(12) (2013) (providing that the Board "shall have the power and authority to . . . [i]nvoke . . . disciplinary measures . . . in any instance or instances in which the Board is satisfied that [a dentist] . . . [h]as been negligent in the practice of dentistry"). At the Board hearing, the Board offered two expert witnesses who testified accordingly. Dr. Keith Yount ("Dr. Yount") confirmed in his testimony that the applicable "standard of care require[s] North Carolina dentists to not only record [the] prescription [of] controlled substances, but the reason for" prescribing those medications. Dr. Yount further testified that Petitioner violated that standard. Dr. Richard Orlowski ("Dr. Orlowski") also testified that the applicable standard of care requires a dentist to record "a reason why [the dentist is] prescribing [a] narcotic" pain medication and that Petitioner violated that standard. Petitioner even acknowledged in her testimony that she had received mandatory training for past record-keeping violations and that this training explained that dentists were expected to record the reasons for the medications they prescribe.

Because "administrative boards which regulate providers of health care" need only find that a provider "failed to conform to the standard of care invoked by the Board" in order to conclude that the provider was negligent, *In re McCollough v. N.C. State Bd. of Dental Exam'rs*, 111 N.C. App. 186, 193, 431 S.E.2d 816, 819 (1993), the testimony of Dr. Yount, Dr. Orlowski, and Petitioner provided the Board with "substantial evidence" that Petitioner had been negligent in the present case. *See Watkins*, 358 N.C. at 199, 593 S.E.2d at 769. Therefore, the trial court's affirmation of the Decision will be overturned only if the Board's conclusion that Petitioner acted negligently was "[a]rbitrary, capricious, or an abuse of discretion[,]" made "[i]n excess of statutory authority[,]" or resulted from "other error of law." *See* N.C.G.S. § 150B–51.

Similar to her previous argument, Petitioner contends that the rule-enforcement limitation in N.C.G.S. § 150B-18, discussed above, also prohibited the Board from disciplining her for negligence under N.C.G.S. § 90-41(a)(12) – specifically because the Board had not adopted a rule that dentists must record a "reason" for the medications prescribed in their treatment records. We disagree.

The authority given to the Board under N.C.G.S. § 90-41(a)(12) does not emanate from the Board's general rulemaking authority under Article 2a of the APA. N.C.G.S. § 90-41(a)(12) is not even part of the APA.[2] Instead, the language in N.C.G.S. § 90-41(a)(12) that the Board "*shall* have the power and authority to . . . [i]nvoke . . . disciplinary measures . . . in *any instance or instances* in which the Board is satisfied that [a dentist] . . . [h]as been negligent in the practice of dentistry" was expressly granted to the Board by a specific enactment of the General Assembly. (emphasis added); *accord McCollough*, 111 N.C. App. at 193–94, 431 S.E.2d at 820 (affirming the Board's determination that a dentist acted negligently under N.C.G.S. § 90-41(a)(12), even though the dentist violated an "unwritten standard of care . . . [not] previously addressed by the Board[.]").

> This Court adheres to the long-standing principle that when two statutes arguably address the same issue, one in specific terms and the other generally, the specific statute controls. And when that specific statute is clear and unambiguous, we are not permitted to engage in statutory construction in any form. This Court may not construe the statute in pari materia with any other statutes, including those that treat the same issue generally. . . . We may look no further than the [specific] statute's plain language to determine whether [the agency] possessed the power it claims in this case.

High Rock Lake Partners, LLC v. N.C. Dep't of Transp., 366 N.C. 315, 322, 735 S.E.2d 300, 305 (2012) (citations omitted).

Although N.C.G.S. §§ 90-41(a)(12) and 150B-18 appear to overlap on the issue of agency discipline, the allocation of authority by the General Assembly to the Board under N.C.G.S. § 90-41(a)(12) is more specific than the allocation under N.C.G.S. § 150B-18. N.C.G.S. § 90-41(a)(12) was enacted to apply specifically to the practice of dentistry and in "*any*

2. However, the *adjudication* of contested cases by occupational licensing agencies are still governed by Article 3a of the APA. *See* N.C. Gen. Stat. §§ 150B-38–42 (2013).

instance or instances in which the Board" concludes that a dentist was negligent.[3] (emphasis added). Conversely, the rule enforcement limitation in N.C.G.S. § 150B-18 is aimed at defining the "[s]cope and effect" of Article 2a of the APA, which in turn applies only to the authority of agencies to adopt rules generally. Moreover, the language in N.C.G.S. § 90-41(a)(12) that the Board "*shall* have the power and authority to . . . [i]nvoke . . . disciplinary measures . . . in *any instance or instances* in which the Board is satisfied that [a dentist] . . . [h]as been negligent in the practice of dentistry[,]" (emphasis added), is "clear and unambiguous[.]" *See High Rock Lake Partners*, 366 N.C. at 322, 735 S.E.2d at 305. Therefore, N.C.G.S. § 90-41(a)(12) controls.

Under the plain language of N.C.G.S. § 90-41(a)(12), *see id.*, we cannot say the Board "exce[eded] [its] statutory authority" by concluding that Petitioner had been negligent in the practice of dentistry. *See* N.C.G.S. § 150B-51(b). For similar reasons, we cannot say that the Board's decision with respect to Petitioner's negligence was "[a]rbitrary, capricious, or an abuse of discretion" or "[a]ffected by other error of law[.]" *See id.* Therefore, the trial court did not err by affirming the Decision on that ground. Moreover, because the alleged misconduct by Petitioner under N.C.G.S. § 90-41(a)(12) and the Record Content Rule was identical, and because the Board could properly discipline Petitioner for having acted negligently under N.C.G.S. § 90-41(a)(12), Petitioner has not established that her "substantial rights . . . [were] prejudiced" by the trial court's error regarding the Record Content Rule. *See id.* The order of the trial court is affirmed.

AFFIRMED.

Judges ELMORE and DAVIS concur.

3. Specifically, Chapter 90 of North Carolina's General Statutes governs the practice of "[m]edicine and [a]llied [o]ccupations" and Article 2 of Chapter 90 addresses the practice of dentistry. *See* N.C.G.S. §§ 90-23–48.6 (2013).

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 16 FEBRUARY 2016)

ASSURANCE GRP., INC. v. BARE No. 15-386	Randolph (12CVS2008-10) (12CVS2012-14) (12CVS2015) (12CVS2364)	Affirmed
BARNEY G. JOYNER FAM. TR. v. DRIGGERS No. 15-1017	Wake (14CVS7795)	Dismissed as moot
BULLOCK v. HOPLER No. 15-537	Durham (14CVD5125)	Affirmed
CAROLINA CHRISTIAN MINISTRIES, INC. v. PRAYER & DELIVERANCE MINISTRIES, INC. No. 15-717	Mecklenburg (12CVS12327)	Affirmed
CASSIDY TURLEY COM. REAL EST. SERVS., INC. v. SOMERSET PROPS. SPE, LLC No. 15-991	Wake (15CVS7741)	Dismissed
D'ALESSANDRO v. D'ALESSANDRO No. 15-357	Wake (11CVD1280) (11CVD9780)	Affirmed
HALL v. GREENE No. 15-486	Durham (13CVS4151)	Affirmed
HAYNES v. NC SCH. OF THE ARTS No. 15-758	Office of Admin. Hearings (14OSP03556)	Affirmed
IN RE A.B. No. 15-895	Forsyth (13J215)	Affirmed in part; vacated and remanded in part
IN RE C.H.M. No. 15-934	Wake (14JT386)	Affirmed
IN RE E.D. No. 15-838	Forsyth (13JT102-103)	Affirmed
IN RE K.A.F. No. 15-849	Guilford (12JT532)	Affirmed

IN RE H.L.S. No. 15-487	Beaufort (13JA42)	Affirmed
IN RE N.F. No. 15-774	Columbus (13JA23)	Affirmed
RAMIREZ v. BRIEGAN CONSTR. SERVS., INC. No. 15-673	N.C. Industrial Commission (Y12275)	Affirmed
STATE v. BATTLE No. 15-617	Johnston (13CRS50594-95) (13CRS871)	No Error
STATE v. COOPER No. 15-872	Moore (12CRS51933)	Reversed and remanded for resentencing
STATE v. DRAYTON No. 15-621	Mecklenburg (13CRS222001)	No Error
STATE v. EGAN No. 15-297	Catawba (11CRS56574)	Vacated in part; Remanded in part.
STATE v. FIELDS No. 15-734	Durham (13CRS62167)	No Error
STATE v. GEORGE No. 15-535	Mecklenburg (12CRS255056)	New Trial
STATE v. HARPER No. 15-784	Catawba (12CRS3754-60)	No plain error
STATE v. HILL No. 15-637	Wayne (14CRS4635)	Dismissed
STATE v. INGRAM No. 15-338	Mecklenburg (13CRS246581-82)	No Error
STATE v. JONES No. 15-848	Guilford (12CRS94384)	No Error
STATE v. MARTIN No. 15-566	Pitt (14CRS53292) (14CRS53331)	Affirmed
STATE v. McCRARY No. 13-1059-2	Chatham (10CRS52754-55)	Vacated in part and Remanded

STATE v. NELSON No. 15-194	Cabarrus (11CRS1365) (11CRS52074-76)	No Error
STATE v. NWANGUMA No. 15-313	Durham (13CRS52583)	No error in part; vacated and remanded in part.
STATE v. PHILLIPS No. 15-730	Forsyth (13CRS60362) (14CRS144)	No Error
STATE v. PINEDA No. 15-800	Wake (11CRS203626-27) (11CRS203631-37) (14CRS196)	No error in part; remanded for resentencing
STATE v. RANKIN No. 15-623	Cumberland (13CRS57779)	No Error
STATE v. RIVERA-MEJIA No. 15-947	Greene (14CRS50455)	No Error
STATE v. SHARP No. 15-759	Wayne (11CRS51064) (12CRS51725) (12CRS51727) (13CRS54696)	Affirmed
STATE v. SINGLETON No. 15-325	Mecklenburg (13CRS240320) (13CRS240321)	Dismissed in part; no error in part
STATE v. TEETER No. 15-570	Mecklenburg (14CRS217389) (14CRS217391) (14CRS29766)	No Error
STATE v. TOMLINSON No. 15-585	Edgecombe (11CRS53380)	Vacated and Remanded
STATE v. WALKER No. 15-922	Wilkes (14CRS52591) (14CRS52816) (15CRS47-48)	Affirmed; Remanded for Correction of Clerical Error
WILSON v. WILSON No. 15-538	Randolph (13CVD1685)	Affirmed

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